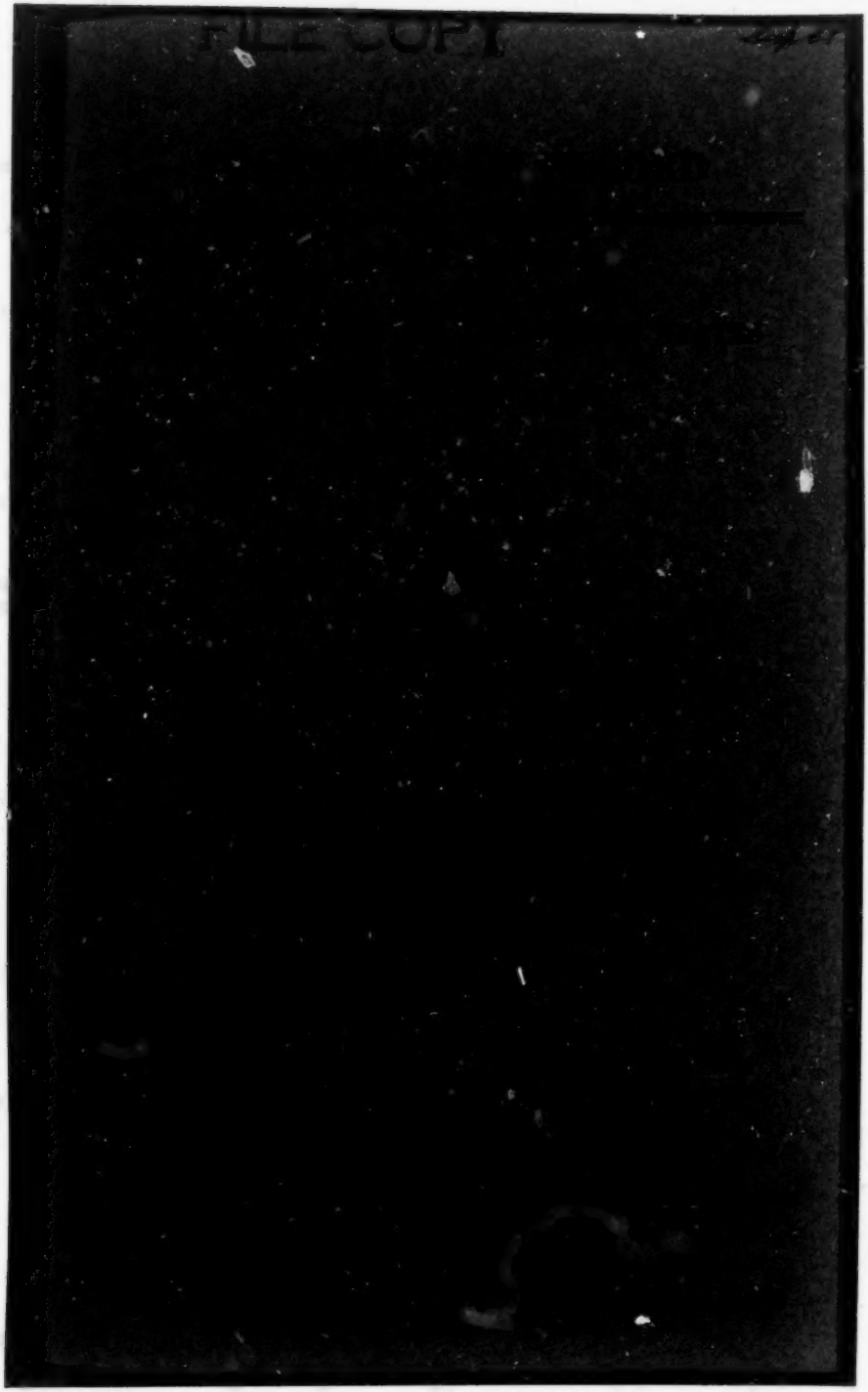
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In
UNITED STATES DISTRICT COURT
For the Northern District of Illinois,
Eastern Division
51 C 947

U. S. A.
— vs. —
THE BORDEN COMPANY *et al.*

Docket Entries

Atty. for Plaintiff:

Willis L. Hotchkiss
Ralph M. McCareins
Earl L. Jinkinson
& E. Houston Harsha
820–
400 Room U.S. Courthouse
Ce-6-6886

Attys. For Defendants:

Attorneys for Hunding Dairy Company & Western United Dairy Co.	Thomas B. Gilmore Schumacher, Gilmore & Van Ness 38 So. Dearborn Street CE 6-2150 for Beloit Dairy Co. & Western United Dairy & Hunding Dairy Co.
American Processing & Sales Company	Herman A. Fischer, Carlton L. Fischer and Harry D. Lavery Campbell, Clithero & Fischer— 1 N. LaSalle Street Ce. 6-1736 Attys for American Processing & Sales Co.
The Borden Co. and Belmont Dairy Co.	Howard Neitzert, Edwin Clark Davis, Walter J. Cummings Jr. & Jos. A. Greaves Sidley, Austin, Burgess and Smith 11 S. La Salle St. –3– St-2-5400

Attys. For Defendants:

Attorneys for

MEADOWMOOR DAIRIES, INC.	CHARLES W. SCHAUB 120 S. LaSalle St. –3– Fr-2-7334 Atty for Meadowmoor Dairies
CAPITOL DAIRY CO.	ISADORE AND HERBERT E. FRIED 111 West Monroe St. – Attys for Capitol Dairy
BELOIT DAIRY CO. BOWMAN DAIRY CO. RIDGEVIEW FARMS DAIRY, INC.	LEO F. TIERNEY AND CHARLES L. STEWART, JR. MAYER, MEYER, AUSTRIAN AND PLATT 231 S. La Salle St. –4– St-2-0600
BOWMAN DAIRY COMPANY AND RIDGEVIEW FARMS DAIRY, INC.	MONTGOMERY, HART, PRITCHARD AND HERRIOTT 120 S. LaSalle St. –3– St-2-0926 EDWARD HART, JR., 120 S. LaSalle St., Leo F. Tierney, 231 S. LaSalle St., Charles O. Parker 120 S. LaSalle St. Attys for Bowman Dairy Co. & Ridgeview Farms Dairy Inc.
	*SIDLEY, AUSTIN, BURGESS & SMITH 11 S. LaSalle St., Sta. 2-5400 Attys for the Borden Co. & Belmont Dairy Co.

Joseph F. Elward, Master
111 W. Washington St. (2)

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JUDGE CAMPBELL
CALENDAR

DOCKET

TITLE OF CASE	ATTORNEYS
UNITED STATES OF AMERICA Plaintiff, vs. THE BORDEN COMPANY; BOWMAN DAIRY COMPANY; AMERICAN PROCESSING AND SALES COMPANY; BELMONT DAIRY COMPANY; BELOIT DAIRY COMPANY; CAPITOL DAIRY COMPANY; HUNDING DAIRY COMPANY; MEADOWMOOR DAIRIES, INC.; RIDGEVIEW FARMS DAIRY, INC.; WESTERN UNITED DAIRY CO., Defendants. *Basis of action:* Anti-Trust - Violation of the Sherman and Clayton Acts. Seeks Injunction and costs. *Jury trial claimed by*	*For Plaintiff:* Willis L. Hotchkiss 820-208 S. ~~LaSalle St~~. CE 6-6886 SEE PREVIOUS PAGE FOR ALL ATTYS. OF RECORD *For Defendant:* The Borden Co.& Belmont Dairy Co -Howard Neitzert Edwin Clark Davis, Walter J. Cummings Jr.& Jos. A. Greaves Sidley, Austin, Burgess & Smith of counsel-11 S. LaSalle St ST 2-4100 For Meadowmoor Dairies Inc. Chas. W. Schaub-120 S. LaSalle St FR 2-7334 For Capitol Dairy Co-Isadore & Herbert E. Fried-111 W. Monroe St See rider for additional attys 2.

DATE	PROCEEDINGS	CLERK'S FEES — PLAINTIFF	CLERK'S FEES — DEFENDANT	ACCOUNT
6-18-51	Filed complaint and (10) copies (23) (JS-5)	15 00	U.S.	
6-18-51	Issued summons and (10) copies with (10) copies of complaint.			
6-25-51	Issued C.C. of Complaint to Dept. Of Justice, Anti Tru t Div.	2 30	US	
6-27-51	Filed summons retd served on Hunding Dairy Co $4.20 d			
" " "	" " " " " The Borden Co. 3.00			
" " "	" " " " " Western United Dairy Co $2.80.			
" " "	" " " " " Capitol Dairy Co 3.20			
" " "	" " " " " Meadowmoor Dairies Inc. $2.80d			
7-6-51	Filed appearance of Howard Heitzert, Edwin Clark Davis, Walter J. Cummings, Jr and Joseph A. Greaves for The Borden Co. and Belmont Dairy Co.			
7-6-51	Filed appearance of Meadowmoor Dairies Inc -Charles W. Schaub Atty			
7-6-51	Filed appearance of Capitol Dairy Co by Isidore & Herbert B. Fried			
7-6-51	Filed appearance of Hunding Dairy Co and Western United Dairy Co - by Thomas B. Gilmore, Schumacher, Gilmore & Van Hess			
7-6-51	Filed appearance of American Processing & Sales Company by Herman A. Fischer, Carlton L. Fischer & Harry D. Lavery d			
7-9-51	Filed summons retd served on Belmont Dairy Co. $2.80			
" " "	" " " " " Beloit Dairy Co. 2.40			
" " "	" " " " " Bowman Dairy Co. 2.80			
" " "	" " " " " American Processing and Sales Company Serv. $3.20			
" " "	Filed summons retd served on Ridgeview Farmes Dairy Co. Serv. $2.60 d			
7-10-51	Filed Notice (2)			
"	Defendants time to answer or otherwise plead and to file briefs in support of said pleadings is extended to Sept. 15, 195- DRAFT -Sullivan, J. (1)			
	Mailed Notice to Attys. 7-16-51			
7-13-51	Filed Appearance of Beloit Dairy Company			
7-20-51	Filed Interrogatories Propounded by pltf. (17)			
" " "	Filed Proof of Service. (2)			
7-23-51	Filed Stip. (1)			
" " "	On stip. defts. ordered to file answers to interrogatories propounded by pltf. on or before Oct. 1, 1951-DRAFT-Igoe, J. (1)			
	Mld. notice to attys. 7-24-51.			
8-1-51	Issued S. C. copy of Complaint to Robert G. Mackay, Atty Examiner Fed. Trade Comm. Const. Barn.	5.75	US	
8-7-51	Filed Notice to take depositions (3)			
8-16-51	Filed Appearance of Bowman Dairy Co. (1)			
8-27-51	Filed Special Subpoena returned served as to George E. Bishop, from Southern District of Calif. Mar's Fees $6.10			
" " "	Filed Special Subpoena returned served as to Albert Bello from Southern District of Calif. Mar's Fees - - - $2.80			
8-30-51	Filed Special Subpoena returned served as to Charles G. Heinz 12.20 K.			3

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DATE	PROCEEDINGS	CLERK'S FEES		AMOUNT REPORTED IN EMOLUMENT RETURNS
		PLAINTIFF	DEFENDANT	
9-13-51	Filed Alternative Consolidated Motion of defts. to dismiss complt. or to strike certain matter and for more definite statement of certain allegations. (12)P			
" " "	Filed Consolidated Motion of defts. to strike complt. to sever and proceed seperately with misjoined claims and drop misjoined defts. therefrom and to compel seperate statement of certain other claims. (5) P			
9-14-51	Filed Notice & Proof of service (2)			
9-14-51	Stipulated order to extend time for defendants' brief in support of motion to strike, etc extended to Oct. 8, 1951 - CAMPBELL,J. - DRAFT - (1)			
	Mailed notice to attys 9-17-51 K.			
10-1-51	Filed Stip. (3)			
" " "	On stip. of parties time within which defts. may file answers to interrogs. propounded by pltf. is extd. to and including Oct. 15, 1951-Campbell, J. -DRAFT. (1)			
	Mld. notice to attys. 10-2-51. P			
10-12-51	Filed Stipulation (2)			
10-15-51	Order on stipulation extending time within which certain Defendants may answer interrogatories to Oct. 23, 1951- DRAFT- BARNES,J.			
	Mailed notice to attys 10-15-51 K.			
10-15-51	Filed Brief of Defendants in support of their consolidated motion to strike complaint etc and 2 copies (20)			
10-15-51	Filed Brief of Defendants in support of their Alternative consolidated motion to dismiss complaint etc (99) K.			
10-15-51	Filed Answers of Defendant Beloit Dairy Co. to Interrogatories propounded by Plaintiff (6)			
10-15-51	Filed Answers of Defendant Meadowmoor Dairies, Inc. to Interrogatories propounded by Plaintiff (7)			
10-15-51	Filed 2 Proof of Service & Notice (2 & 2) K.			
10-26-51	Filed Stip. (3)			
" " "	Filed Motion. (1)			
" " "	Order on stip., extending pltf's. time for filing briefs in opposition to two consolidated motions of defts. to and including Nov. 2, 1951-DRAFT-Campbell, J. (1)			
	Mld. notice to attys. 10-29-51. P			
11-1-51	Filed Notice (2)			
11-1-51	Filed Motion (2)			
11-1-51	Order dispensing with filing of Answers to Government's Interrogatories with Clerk of this Court- DRAFT-CAMPBELL,J.			
	Mailed notice to attys 11-6-51 (1)			
11-1-51	Filed Plaintiff's more Definate Statement (3)			
11-1-51	Filed Plaintiff's Brief in opposition to Deft. Consolidated Motions to strike the Complaint etc. (38)			
11-1-51	Filed Notice & Proof of Service (3) K.			
11-7-51	Filed Motion for an order to U.S. Marshal to pay certain Witness Fees (2)			
11-7-51	On motion of Plaintiff Ordered that U. S. Marshal pay certain Witness fees - DRAFT - CAMPBELL,J. (1)			
	Mailed notice to attys 11-8-51 K.			
11-9-51	Filed Deposition of George R. Bishop.			
" " "	Filed Deposition of Albert Bello.			
" " "	Filed Notice and Proof of Service. (3) P			4

DATE	FILINGS—PROCEEDINGS	CLERK'S FEES		AMOUNT RECEIVED & ENCLOSED RETURNS
		PLAINTIFF	DEFENDANT	
11-9-51	Filed Additional Interrogatories propounded by pltf. (7)			
" " "	By agreement defts. time to file reply briefs in support of motion to strike etc. extd. to Nov. 19, 1951-DRAFT-Campbell, J. (1)			
	Mld. notice to attys. 11-13-51. P			
11-19-51	Witness Card of Mr. George R. Bishop.			
" " "	Witness Card of Mr. Charles C. Heins.			
" " "	Witness Card of Mr. Albert Bello.			
11-19-51	Filed Notice. (1)			
" " "	Filed Motion. (2)			
" " "	Defts. time to file reply brief on motions to strike and dismiss etc., extd. to Dec. 14, 1951-Campbell, J.			
	Mld. notice to attys. 11-27-51. P			
11-21-51	Filed Notice, and Motion. (4)			
" " "	Ordered that the depositions of all witnesses heretofore filed or hereafter filed in this cause remain sealed and impounded until the Court ruleson the pending motion. Said pending motion of defts. to seal depositions is taken under advisement on briefs. Defts. brief to be filed in 10 days and Opposing brief 10 days thereafter and Reply brief 5 days thereafter-Campbell, J.			
	Mld. notice to attys. 11-27-51. P			
11-27-51	Filed Notice and Proof of Service. (3)			
" " "	Filed Motion. (1)			
11-27-51	Filed Answers and objections of deft. Beloit Dairy Co. to add'l. interrogatories propounded on 11-9-51. (4)			
11-27-51	Motion of deft. Beloit Dairy Co., that all depositions remain sealed and impounded taken under advisement and consolidated with other defts. similar motion heretofore filed herein. Objections of deft. Beloit Dairy Co. to pltf's. interrogatories are taken under advisement on briefs pursuant to Rule 7 of this Court. Deft's. supporting brief to be filed in 10 days. Opposing brief 10 days thereafter and Reply Brief 5 days thereafter-Campbell, J.			
	Mld. notice to attys. 11-30-51. P			
12-3-51	Filed Notice and Proof of Service. (2)			
" " "	Filed brief of defts. in support of motions to have depositions Remain under seal. (10)			
12-7-51	Filed Memorandum of deft. Beloit Dairy Co. in support of its objections to add'l. interrogatories propounded by pltf. (7)			
" " "	Filed Notice and Proof of Service of Memorandum (2)			
12-10-51	Filed Deposition of Charles C. Heins. P			
12-14-51	Filed Notice (2)			
12-14-51	Filed Notice & Proof of service of Plaintiff's brief (3)			
12-14-51	Filed Notice of Filing Depositions and proof of service (3)			
12-14-51	Filed Plaintiff's Brief in Opposition to Defendant's motion for an order directing depositions remain under seal - & Copy (23)			
12-14-51	Filed Defendants' Reply brief in support of their consolidated Motion to strike etc (17)			
12-14-51	Filed Defendants Reply brief in support of their alternative Consolidated motions etc (32)			

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DATE	PROCEEDINGS	CLERK'S FEES	
		PLAINTIFF	DEFENDANT
12-17-51	Filed Notice of Filing Plaintiff's Brief etc (3)		
12-17-51	Filed Plaintiff's Brief in opposition to the objections of Defendant Beloit to additional interrogatories etc(7)		
12-20-51	Filed Notice (2)		
"	Filed Defendants' Reply Brief in Support of Motions to to have depositions remain under seal (18)		
12-21-51	Filed Notice and Proof of service (2)		
"	Filed Supplemental Answer to additional interrogatories propounded by plaintiff to defendant Beloit Dairy Company on Nov. 9, 1951 (1)		
"	Filed Reply Brief of defendant Beloit Dairy Company in Support of objections to additional interrogatories propounded by Plaintiff on Nov. 9, 1951 (2)		
2-5-52	Clerk's File Copy of Transcript of proceeding Nov. 21, 1951 filed by Official Court Reporter (4)		
5-15-52	Pltf's. motion for oral argt. on the motions now under advsmt. will be considered by the Court at the time he reads the briefs now on file - Campbell, J. Mld. notice to attys. 5-19-52		
6-18-52	Ordered by the Court that defts. motion to dismiss is set for oral argument Monday, June 23, 1952 at 2:00 p.m.. Campbell, J. Mld. notice to attys. 6-19-52.		
6-23-52	Oral argts. of counsel hrd, and defts' mo to dism. is taken for furth. deliberation by the Ct. - Campbell, J. Mld. note. to attys., 6-27-52.		
6-25-52	Consolidated motion of defts to strike the complaint, to sever and proceed separately with certain claims and drop certain defts therefrom, and to compel separate statement of certain other claims is denied. Alternative consolidated motion of defts to dismiss the complaint or to strike certain matter, and for more definite statement of certain allegations is hereby denied. Defts are hereby ordered to answer complaint within 20 days hereof. Mo of the defts that all depositions taken in this causeg and sealed by the officer takeing the depositions, be opened only by order of this Court, is hereby denied. Objections of deft Beloit Dairy Co to additional interrogs propounded by pltf on Nov 9, 1951 is hereby overruled. Deft. Beloit Dairy Co is hereby ordered to answer said interrogatories within 20 days hereof. Because of the crowded condition of the Court's calendar and the complexities of this cause and in the interest of the orderly administration of justice this cause is hereby generally referred to Master Joseph F. Elward for hearing and report - Campbell, J		
6-26-52	Mld C.C.of order of Reference To Master Elward Mld ntc to attys 7-1-52		40 03
7-1-52	Filed Notice & Proof of Service (4)		
7-1-52	Filed Plaintiff's motion to set aside The Court Order referring this cause to a Master (2)		
5-15-52	Filed Notice and Proof of Service. (3)		

DATE	PROCEEDINGS	CLERK'S FEES: PLAINTIFF	CLERK'S FEES: DEFENDANT	AMOUNT REPORTED IN EMOLUMENT RETURNS
7-9-52	Filed Notice & Proof of Service (3) k			
7-10-52	Filed Plaintiff's Brief in support of its Motion to set aside the order of the Court Referring this case to a Master in Chancery (16& Exhibits attached) K			
7-11-52	Filed Stip. (1)			
" " "	On stip. order extending time for deftain defts. to answer to August 6, 1952-Perry, J.- DRAFT- (1) Mld. notice to attys. 7-14-52. P			
7-15-52	Order by stipulation of attys it is ordered that time to answer Complaint be extended to August 14, 1952, that time of defendant Beloit Dairy Co. to answer interrogatories be extended to August 14, 1952 -DRAFT- PERRY,J. (1) Mailed notice to attys 7-17-52 K			
7-16-52	Fld. Ans. of Am. Processing & Sales Co. to Complt.(5) r			
8-8-52	Deft's time to answer extended to Sept. 15, 1952. Time of deft, Beloit Dairy to answer interrogs extended to Sept. 15, 1952. Hrg on Pltf's motion to vacate reference to Master continued to Sept. 23, 1952 - Campbell, J. DRAFT (1) Mld notice to attys. 8-11-52 SB			
9-9-52	Filed Notice			
9-9-52	Filed Answer of Capitol Dairy Co To The Complaint of the U.S.A. (5) d			
9-16-52	Order time for deft. Bowman Dairy to ans complt ext to Sept 19, 1952, on stip DRAFT -Barnes Noc mld to attys 9-18-52 sb			
9-16-52	Filed stip (on above) (1)			
9-16-52	By agrement, order time for deft Beloit Dairy Co. to ans. complt ext to 10-1-52 and time for said deft to ans interr ext to Oct 15, 1952 -DRAFT -Barnes Noc mld to attys 9-18-52 sb			
9-15-52	Filed answer of Meadowmoor Dairies,Inc. to Complt (6) sb			
9-19-52	Filed Answer of Ridgeview Farms Dairy Inc., to complaint(4)			
9-19-52	Filed Ans. of Bowman Dairy Co. to complt. (5)			
9-19-52	Filed Ans of Borden Co. to complaint (6)			
9-19-52	Filed Ans. of Belmont Dairy Co. to complt. (4) K			
9-22-52	Arguments of counsel heard- Plaintiff's motion to vacate reference to Master denied. - CAMPBELL,J. Mailed notice to attys 9-25-52 K'			
10-1-52	Filed Answer of Beloit Dairy Co. (7) K			
10-6-52	Filed notice and ans of Hunding Dairy Co & Western United Dairy Co. (1) (3) sb			
10-16-52	Filed Notice (2)			
10-16-52	Filed Motion Of Beloit Dairy Co for Order Under Rules 30 1b) and 33 Of Federal Rules Of Civil Procedure (1)			
10-16-52	Order excusing defendant Beloit Dairy Co from filing answers to interrogatories with Clerk Draft- Campbell,J Mld ntc to attys 10-17-52 d			
11-21-52	Filed Notice and Proof Of Service (4)			
11-21-52	Filed Motion (2)			
11-21-52	Filed Stipulation (3)			

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DATE	PLEADINGS—PROCEEDINGS	CLERK'S FEE PLAINTIFF	CLERK'S FEE DEFENDANT	AMOUNT REMITTED IN ENCLOSURE RETURNED
11-21-52	On stipulation, order staying all proceedings under order of reference to Master for 30 days and until further order of court Draft -Campbell, J			
	Mld ntc to attys 11-25-52 d			
12-11-52	It Is Ordered by the Court that the portion of the Court's order of June 26, 1952 referring as this cause generally to Master Joseph F. Elward for hearing and report is hereby vacated - Campbell, J			
	Mld ntcs to attys 12-17-52 d			
1-5-53	It is ordered by the Court that this cause is set for trial at the head of the call on January 20, 1953-Campbell,J			
	Note mld to attys 1-6-53 sb			
1-8-53	Transcript of Proceedings held before Judge Campbell on Sept. 23, 1952 filed by Off Court Reporter (14) sb			
1-12-53	Filed Notice and Proof of Service (3)			
"	Filed Motion and Affidavit (3)			
"	Enter order on govt's motion for an order to reset date of this action from 1-20-53 to later date, entered and contd to 1-20-53 before Judge Campbell. - Barnes, J.			
	Mailed notice to attys 1-13-53 H			
1-20-53	Filed Affidavit of E. Houston Hersha (to supplement affidavit in support of mo to reset date of trial) (2)			
1-20-53	Cause called for trial On pltf's motion to reset trial date, the cause is contd to Feb 16, 1953, head of call Campbell, J			
	Mld ntc to attys 1-21-53 d			
1-27-53	Filed Motion (2)			
"	Enter order directing the issuance of subpoenas ad testificandum to four witnesses. DRAFT - Campbell, J.			
	Mailed notice to attys 1-30-53 H			
~~1-28-53~~	~~Filed Notice (1)~~			
~~"~~	~~Filed Additional Answers to Deft's Interr. (11) H~~ on Albert Bello			
2-2-53	Filed Witness Subpoena ret'd. served./ .50			
2-2-53	Filed Witness Subpoena ret'd. served on George R. Bishop & $3.70 P			
2-6-53	Cause set for pre-trial conference Feb. 12. 1953 at 10:15 a.m. Pltf's. motion for an order to require defts. to file their an wers to interroge. is cont'd. to be taken up at the pre-tr. conf-Campbell, J.			
	Mld. notice to attys. 2-9-53. P			
2-6-53	Filed Notice and Proof Of Service (1) (3)			
2-6-53	Filed Motion For An Order To Require Defts To File Answers To Interrogs and For Pre-Trial Conf (2) d			
2-9-53	Filed witness subpoena retd served on Charles C. Heinz	4.30 d		
2-12-53	Filed Witness subpoena ret the following			
	James Kreml $1.90			
	Julius Guy Johnston 1.60			
	Herbert W. Horton 10.60			
	Mrs Helen Hollen 1.70			
	Lucile O. Ensminger .80			
	Mrs Mary Dernell .80			R
	William P. Bowman 2.30 d			

DATE	PROCEEDINGS	FEES: PLAINTIFF	FEES: DEFENDANT
2-12-53	Filed witness subpoena - re the following		
	Frank J. Zink $.90		
	Maude E. Williams .90		
	Otta A. Sedlak 1.30		
	Earl C. Riley .50		
	Louis J. Pushauer 1.90		
	Joseph James Pergler 2.90		
	Richard Myers 1.50		
	Irene Murphy 2.70		
	Hans Moser 2.10		
	Burnell H. Mathis 7.70		
	Alfred Bianchi Sr 8.90		
	Dorothy A. Roland .70		
2-12-53	Filed Subpoena Duces Tecum re the following		
	The Borden Co $.50		
	Jos F. Malone 1.50		
	Charles W. Schau 1.30		
	Robert H. Spitze 1.30		
	Maude D. Williams .90		
	Frank J. Zink .40		
	Bowman Dairy Co .90		
2-12-53	Filed Motion (1)		
2-12-53	Order that subpoena issue to non-resident witness (draft Campbell, J		
2-12-53	Pre-trial conference held and stipulations entd into as appear in the Official Court Reporter's transcript of this conference. Motion of pltf. that defts' answers to pltf's interrogatories now be filed is denied without prejudice to pltf's introducing said answers on the presentation of its case- Campbell, J		
	Mld ntc to attys 2-13-53		
2-13-53	Filed Sub. Duces Tecum retd served on J. Stoklas $2.90		
2-13-53	Filed witness sub retd served on Sam Barrance $2.90		
" " "	" " " " " " John Kane 2.90		
" " "	" " " " not found as to Patrick J.Cunningham		
" " "	" " " " not found as to Leo M. Cahill $2.20		
" " "	" " " " not found as to Dorothea Moore 1.00		
	Hoffman M1 $1.50		
2-13-53	Further pre-trial conference held - Campbell, J.		
2-16-53	Further pre-trial conference held - Campbell, J.		
2-17-53	Further pre-trial conference held - " "		
2-17-53	Ordered by the court that the testimony of witness Heine be taken by deposition by the Official Court Reporter of this court for use at the trial. Attys for the pltf and for defts Borden and Bowman are directed to be present at the taking of said deposition. Attys for the other defts may be present if they desire. All parties reserve the right to offer objections that are material at the time the deposition is presented. Witness Heine sworn by the Clerk in the presence of Court and Counsel - Campbell,J.		
	Mailed notice to attys 2-18-53 M		
2-17-53	Filed witness subpoena, retd served as to J.Dallain $1.50		
"	" " " " retd served as to W.H.Schaub 1.30		
"	" " " " " " Michael Cossi 2.30		
"	" " " " " " Gertrude Dallain 6.30		
"	" " " " " " Roy W. Ruthman 1.30		

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DATE	PLEADINGS—PROCEEDINGS	CLERK'S FEES — PLAINTIFF	CLERK'S FEES — DEFENDANT	AMOUNT REPORTED IN DISBURSEMENT RETURNS
2-17-53	Filed wit.subpoena,retd served as to Albert A.Weber 2.10			
"	" " " " " " Carl J.Walcrak 4.90			
"	" " " " " " Casey Nowicki 2.30			
"	" " " " " " Adolph E.Moller 2.50			
"	" " " " " " Charles Fornhoff 2.50			
"	" " " " " " Mary Fitzgerald .70			
"	" " " "not served - Daniel S. McGuire .40			
"	" " " " " " - Martin J.Morley -			
"	Filed Subpoena Duces Tecum returned served as to Hezikiah C. Eggleston 7.30			
"	Filed Subpoena Duces Tecum returned not served as to F.M. Tegtmeyer. .80			
"	Filed Subpoena Duces Tecum returned not served as to Sol Eisenstein -	E		
2-18-53	Witness Card of Charles C. Heins. $410.78 pd			
" " "	Filed Witness Subpoena ret'd. unexecuted as to Raymond F. Schroeder. Mileage $1.60			
2-18-53	Further pre-tr. conf. held-Campbell, J. Mld. notice to attys. 2-20-53.	P		
2-19-53	Filed Witness Subpoena ret'd. unexecuted as to Raymond C. Stephens. Mileage $4.00			
" " "	Filed Witness Subpoena ret'd. unexecuted as to James J. Curtin. Mileage $2.00			
2-19-53	Filed Witness Subpoena ret'd. unexecuted as to Cmdr. L. T. Maiman. No expense			
2-19-53	Filed Witness Subpoena ret'd. served as to Mrs. M. Eleanor Purdy. 1 serv. $9.00			
2-19-53	Filed Witness Subpoena ret'd. served as to Abe Goldman 1 serv. $2.30			
2-19-53	Filed Witness Subpoena ret'd. served as to Mrs. Walter Wallace. 1 serv. $4.60			
2-19-53	Filed Witness Subpoena ret'd. unexecuted as to Bertram L. Metzger. Mileage $2.00			
2-19-53	Filed Subpoena ret'd. served as to George Rhody 1 serv. $3.50			
2-19-53	Filed Subpoena Duces Tecum ret'd. served as to American Processing & Sales Co. 1 serv. $1.70			
2-19-53	Filed Subpoena Duces Tecum ret'd. served as to Western United Dairy Co. 1 serv. $1.30	P		
2-19-53	Further pre-trial conference held-Campbell, J. Mld. notice to attys. 2-20-53.	P		
2-19-53	Enter Consent decree for permanent injunction as to defts. American Process & Sales Co., Capitol Dairy Co., Hunding Dairy Co., Meadowmoor Dairies Inc. and Western United Dairy Co.-DRAFT-Campbell, J. (8) Mld. notice to attys. 2-20-53.	P		
2-20-53	Further pre-trial conference held - Campbell, J Mld ntc to attys 2-24-53	d		
2-20-53	Filed Subpoena retd served on Mr William H. Horton -$4.30	d		
2-20-53	Issued Certified Copy of Final Judgment entd on 2/19/53 to Antitrust Div		2 00	73
2-24-53	Further pre-trial conference held -Campbell,J			
2-24-53	Order denying plaintiff's motion that answers to interrogs be filed Draft -Campbell, J Mld ntc to attys 2-25-53	d		

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DATE	PROCEEDINGS	CLERK'S FEES: PLAINTIFF	CLERK'S FEES: DEFENDANT	AMOUNT REPORTED IN EMOLUMENT RETURNS
2-24-53	Filed Subpoena ret'd served on Raymond F. Schroeder 2,10			
" " "	Further pre-trial conference held. Campbell,J Notice mld to attys. 2-26-53 tb			
2-25-53	Filed Deposition of Charles C. Heins d			
2-26-53	Further pre-trial conference held - Campbell,J Mld ntc to attys 2-27-53 d			
2-27-53	Further pre-trial conference held. Arguments of counsel heard on matter of "cut-off" date. Counsel for defts directed to prepare and present for signature an order conforming with the Court's ruling. Cause contd to 3-2-53 for further pre-trial conference and trial.-Campbell,J. Mailed notice to attys 3-2-53 H			
2-27-53	Filed Witness Subpoena Ret'd served as to John K.McVeigh (1 serv.) 6,40			
"	" " " " " " Albert G.Ezzebrecht (1 serv.) 4,10			
"	" " " " " " Abraham Wittenberg (1 serv.) 3,70			
"	" " " " " " Berthram L.Metzger (1 serv.) 1,70			
"	" " " " " " John J. Curtin (1 serv.) ,50			
"	" " " " " " Martin J. Morley (1 serv.) 7,10			
"	" " " " " " Harold Wainess (1 serv.) ,90			
"	" " " " " " Harry Pritikin (1 serv.) 2,10			
"	" " " " " " Edward F.Sullivan (1 serv.) ,50			
"	" " " " " " Lorne Snoberger (1 serv.) 2,50			
"	" " " " " " Lucille Fugg (1 serv.) 5,30			
"	Filed Subpoena Duces Tecum Ret'd served as to Hunding Dairy Company (1 serv.) 2,70			
"	Filed Subpoena Duces Tecum Ret'd served as to William W. Hunding (1 serv.) 2,70			
"	Filed Witness Subpoena Ret'd unexecuted as to Christ Koehn 1,60			
"	" " " " " " Frank L.Wilkie (20 Mi.) 2,00			
"	" " " " " " James A.Meany (4 Mi.) ,40			
"	" " " " " " Lorne Snoberger -			
"	Filed Subpoena Duces Tecum Ret'd unexecuted as to Hyman A. Shankman, -			
"	Filed Subpoena Duces Tecum Ret'd unexecuted as to Hyman A. Shankman (12 Mi.) 1,20			
"	File' Subpoena Duces Tecum Ret'd unexecuted as to Hunding Dairy Co, -			
"	Filed Subpoena Duces Tecum Ret'd unexecuted as to William W. Hunding - H			
"	Filed Subpoena Duces Tecum Ret'd served as to Belmont Dairy Company (1 serv.) 1,50 H			

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DATE	PROCEEDINGS	CLERK'S FEES	
		PLAINTIFF	DEFENDANT
3-2-53	Order providing payment of fees to certain of plff's witnesses Draft - Campbell, J Mld ntc to attys 3-4-53 d		
3-3-53	Further pre-trial conference held - Campbell, J Mld ntc to attys 3-4-53 d		
3-4-53	Pre-trial Order entd DRAFT -Campbell, J (26) & Schedules Mld notc to attys 3-4-53 d		
3-4-53	Evidence in part heard for plff. Further trial of cause contd to 3-5-53. - Campbell, J. Mailed notice to attys 3-5-53 K		
3-4-53	Filed Subpoena Duces Tecum returned served as to Thomas C. McConnell (no cost)		
"	Filed Witness Subpoena Ret'd served as to John T. Walker (1 serv.) 28.50		
"	" " " " " " Fred Zeller (1 serv.) .50		
"	" " " " " " John Wilson (1 serv.) .70		
"	" " " " " " David B. Pack (1 serv.) .50		
"	" " " " " " Paul Dewey (1 serv.) 1.50		
"	" " " " " " Arthur E. Miller (1 serv.) .50		
"	" " " " " " Gus Michas (1 serv.) .90		
"	" " " " " " Daniel B. McGuire (1 serv.) 1.50		
"	" " " " " " J. F. Malone (1 serv.) .70		
"	" " " " " " James Maley (1 serv.) .70		
"	" " " " " " R. W. Anderson (1 serv.) .50		
"	" " " " " " Harold Patterson (1 serv.) .70		
"	" " " " " " E. A. Amacker (1 serv.) .50		
"	" " " " " " Martin D. Kastner (1 serv.) .70		
"	Filed Witness Subpoena Ret'd unexecuted Thomas A. Steddard (1 serv.) 1.20		
"	" " " " " " Ben Ofenloch (1 serv.) 2.20		
"	" " " " " " Joseph Karasek (1 serv.) - K		
2-27-53	Order fixing Sept. 16, 1940 as the cut-off date-DRAFT-Campbell, J. (Opinion and Order) (\$) Mld. notice to attys. 3-9-53. P		
3-9-53	Mld. copy of Opinion and order entered 2-27-53 to Attorney General, Wash., D. C. P	60	75
3-4-53	Witness card of William H. Horton Pd 450.32		
"	Witness card of Albert Belle Pd 530.46 tb		

DATE	PROCEEDINGS	CLERK'S FEES: PLAINTIFF	CLERK'S FEES: DEFENDANT
3-5-53	Witness card of Otto A. Sodlak pd 16.20		
3-5-53	" " " Herbert W. Horton pd 11.70		
3-5-53	Filed Certificate of Compliance with par. VI(6) to consent decree by H. W. Peters (1)		
3-5-53	Filed Subpoena Duces Tecum Ret'd served as to Capitol Dairy Company - 1 served 1.70		
"	Filed Subpoena Duces Tecum Ret'd served as to American Processing and Sales Co.(Hawthorn Mellody Division)		
"	Filed Subpoena Duces Tecum Ret'd served as Meadowmoor Dairies, Inc.		
"	Filed Subpoena Duces Tecum Ret'd served as to Capitol Dairy Company		
3-5-53	Further evid. heard for pltff. Further trial of cause continued to March 6, 1953. Campbell-J Mld notice to attys. 3-11-53		
3-6-53	Further evid. heard for pltff. Further trial of cause continued to March 9, 1953. Campbell-J Mld notice to attys. 3-11-53		
3-9-53	Further evid. heard for pltff. Further trial of cause continued to March 10, 1953. Campbell-J Mld notice to attys. 3-11-53 th		
3-10-53	Further evidence heard for pltf.Further trial of cause contd. to Mar 11,1953 - Campbell,J Mld ntc to attys 3-12-53 d		
3-11-53	Further evid.heard for pltf.Further trial of cause contd to Mar. 12, 1953 -Campbell,J Mld ntc to attys 3-12-53 d		
3-11-53	Filed Sub. Duces Tecum reid served on Harold Krulgy Atty " " " " " " " Herman A Fischer Atty " " " " " " " Loretta Walsh Secretary to Atty Chas. W. Schaub		
2-11-53	Filed Sub Duces Tecum retd served on Irene Koepin-Antitrust Div.,Department of Justice d		
3-13-53	Witness Card of San Barranco. $11.08 pd.		
3-13-53	Witness Card of Charles Forneff. $11.08 pd.		
" "	Witness Card of Lerre Snoberger. $10.52 pd.		
3-13-53	Witness Card of Mr. John T. Walker. $72.54 pd		
3-13-53	Filed Affidavit of Seymour J. Freed (1)		
"	Filed Subpoena, returned served as to Martin A.Kastner 2.70		
3-12-53	Further evidence heard for pltf. Further trial of cause contd to 3-13-53. - Campbell, J. Mailed notice to attys 3-16-53		
3-13-53	Further evidence heard for pltf. Further trial of cause contd to 3-16-53. - Campbell, J. Mailed notice to attys 3-16-53 E		
3-13-53	Witness Card of Joseph J. Weiglein $6.10 pd.		
"	" " " Alfred P. Bianchi 17.00 pd.		
"	" " " John J. Curtin 16.20 pd.		
"	" " " Julius Guy Johnston 1.70 pd.		
"	" " " Patrick J. Cunningham 5.40 pd.		
"	" " " Andrew D'Alessandro 4.84 pd.		
"	" " " Esther Beck MacMillan 5.96 pd.		
"	" " " Hans Moser 5.12 pd.		
"	" " " Martin Petrosek 11.92 pd		
"	" " " Raymond C. Stephens 8.48 pd.		
"	" " " Walter Wagner 7.22 pd.		

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DATE	PROCEEDINGS					
3-16-53	Further evidence heard for pltf. Further trial of cause contd to March 17, 1953 -Campbell, J					
	Mld ntc to attys 3-17-53					d
3-10-53	Filed Plaintiff's OfferOf Proof In Accordance With Rule 43 of Federal Rules Of Civil Procedure					
3-11-53	Filed Defendant's Objections To Plaintiff's Offer Of Proof				(17)	
3-12-53	Filed Offer Of Proof				(7)	
3-17-53	Filed (2) Stipulation				(1)	
3-17-53	Filed Objections Of Defendants To Government's Ex No 233				(2) (2)	
3-17-53	Filed Objections Of Defendants To Government's Ex No 234				(2)	
3-18-53	Filed (2) Affid's Proof Of Service				(1) (1)	d
3-17-53	Witness Card of Vito Mascioninto				4.70 md.	
"	" " " Paul A. Potter				4.14 md.	
"	" " " James A. Meany				5.68 md.	
3-18-53	Filed Subpoena, returned unexecuted					
3-17-53	Further evidence heard for pltf. Further trial of cause contd. to 3-18-53. - Campbell, J.					
	Mailed notice to attys 3-19-53					R
3-19-53	Filed Defendants' Objections to plaintiff's offer of proof				(2)	
"	Filed Defendants' Objections to plaintiff's offer of Proof				(1)	
"	Filed Statement of facts as to the information on which Borden Based its answers to interrogatories 11, 12, 13, 14, 15, 18 and 19				(5)	R
3-1 9-53	Further evidence hrd for pltff. Further trial of cause cont'd to March 19, 1953. Campbell-J					
3-19-53	Further evidence heard for pltff. Further trial of cause cont'd to March 20, 1953. Campbell-J					th
3-20-53	Further evid. hrd for pltf. Further trial of cause contd to Mar. 23, 1953 -Campbell, J					
	Mld ntc to attys 3-20-53					d
3-18-53	Witness card of Mrs. Joan Fudle			Pd.	$ 4.70	
"	" " Julius Sobolaski			"	4.84	
"	" " Mrs. Clara Victor			"	4.56	
"	" " Karol J. Walczak			"	5.82	
"	" " Mrs. Dorothea Wallace			"	6.38	
"	" " Abraham Wittenberg			"	4.70	
"	" " Phillip Berman			"	4.38	
"	" " Milt Biliak			"	4.70	
"	" " Mrs. Dorothy Lavery			"	4.56	
"	" " Sam Piraino			"	4.28	
"	" " Casimer Synowiec			"	4.70	
"	" " Frank Foster			"	5.68	
"	" " Erick Fraemel			"	4.56	
"	" " Harold A. Grund			"	4.70	
"	" " Andrew Heider			"	4.70	
"	" " Andrey Karle			"	5.40	
"	" " Mrs. Sophie Lorenc			"	4.70	
"	" " Chester W. Spivey			"	8.62	
"	" " Harold S. Swanson			"	4.70	
"	" " Willard P. Bodwman			"	5.12	
"	" " Edwin Brasfield			"	5.40	
"	" " Michael Corri			"	4.56	
"	" " Albert O. Roggebrecht			"	6.24	
"	" " Meyer Freedman			"	5.40	

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DATE	PROCEEDINGS		
3-18-59	Witness card of Michael Glaser	Pd	$ 5.40
	" " " Mrs. Sarah Kaplan	"	4.70
	" " " Melvin E. Kornkamp	"	13.68
	" " " Gerald T. Killeen	"	5.68
	" " " Alexander T. Koclanes	"	5.68
	" " " Paul Krueger	"	4.56
	" " " Mrs. Martha Lemmer	"	4.70
	" " " Saul Leshner	"	5.54
	" " " Mrs. Clementine Liebner	"	5.82
	" " " Louis Miller	"	4.42
	" " " Richard Myers	"	5.26
	" " " Chester Matejcryk	"	4.98
	" " " George G. Brody	"	11.92
	" " " Ben Shulman	"	5.40
	" " " Bruno Siemieniec	"	5.40
	" " " Harry Pritikin	"	5.82
	" " " Sam Parker	"	4.84
3-23-59	Filed Subpoena D.T. Rat'd Served as to Walter Winn		.90
	" " " " " " Sidney Wanzer & Sons		1.90
	" " " " " " Western United Dairy		.50
	" " " " " " " " "		.50
	" " " " " " Ridgeview Farms "		.50
	" " " " " " " " "		.50
	" " " " " " S. Anita Man		-
	" " " " " " Paul Krueger		-
	" " " " " " Hunding Dairy Co.		.50
	" " " " " " " " "		.50
	" " " " " " H. C. Eggleston		-
	" " " " " " Hezikiah C. Eggleston		.50
	" " " " " " Bowman Dairy Co.		.50
	" " " " " " " " "		.50
	" " " " " " " " "		.50
	" " " " " " The Borden Co.		.50
	" " " " " " " " "		.50
	" " " " " " Beloit Dairy Co.		.50
	" " " " " " Belmont Dairy Co.		-
	" " " " " " " " "		.50
	" " " " " " " " "		.50
3-23-59	Filed Wit. Subpoena " " " " Harris Tr. & Sav. Bank		-
	" " " " " " Samuel Tortorich		1.50
	" " " " " " Charles Tarnutzer		1.90
	" " " " " " Casimer Synowiec		1.10
	" " " " " " Bruno Siemieniec		2.50
	" " " " " " Mrs. Pudle		2.90
	" " " " " " Samuel Fritzman		.90
	" " " " " " Mrs. Sofie Lorenc		1.70
	" " " " " " Mrs. Martha Lemmer		1.90
	" " " " " " Mrs. Dorothy Lavery		1.50
	" " " " " " Tom J. Kullman		.50
	" " " " " " Gerald T. Killien		2.90
	" " " " " " Andy Kank		2.70
	" " " " " " Christ Hoehn		2.70
	" " " " " " Erick Fraenel		1.90
	" " " " " " Hezikiah C. Eggleston		2.30
	" " " " " " Dr. Leo M. Ozaja		2.30
	" " " " " " Mrs. Clara Victor		1.70
	" " " " " " Anthony Taranowski		.70
	" " " " " " Harold B. Swanson		-
	" " " " " " Chester W. Spivey		

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DATE	FILINGS—PROCEEDINGS	CLERK'S FEES PLAINTIFF	CLERK'S FEES DEFENDANT	AMOUNT REMITTED IN EMOLUMENT RETURNS
1-57	Filed Wit. Subpoena Ret'd Served as to Julius Sobolewski 1.70			
	" " " " " " Chester Ratajczyk 1.70			
	" " " " " " Sam Pimpino 1.10			
	" " " " " " Sam Parker 1.10			
	" " " " " " Louis Miller 1.10			
	" " " " " " Vito Pascuzzinto 1.90			
	" " " " " " Mrs.C.Liebner 2.50			
	" " " " " " Sol Leshner 2.90			
	" " " " " " Oscar Kuehn -			
	" " " " " " Alexander T. Koclanes 1.50			
	" " " " " " Mrs. Sarah Kaplan .50			
	" " " " " " R.H.Hitchner .70			
	" " " " " " Andrew Heider -			
	" " " " " " Harold A.Grund-			
	" " " " " " Michael Glaser 2.50			
	" " " " " " Frank Foster -			
	" " " " " " Milt Bilink 1.70			
	" " " " " " Phillip Berman-			
	" " " " " " Joe Weislein -			
	" " " " " " Frank O.Washum -			
	" " " " " " Raymond C. Stephens 8.50			
	" " " " " " Ben Shulman -			
	" " " " " " Paul Potter .90			
	" " " " " " Martin Patkasek 3.70			
	" " " " " " Novis Park 2.90			
	" " " " " " Edward J. Neafsey -			
	" " " " " " M.H.Kernkamp 1.70			
	" " " " " " Charles Kukacek 2.90			
	" " " " " " Charles Vernon George 3.30			
	" " " " " " Meyer Freedman.50			
	" " " " " " Patrick J. Cunningham -			
	" " " " " " Edwin Brasfield 2.50			
	" " " " " " Willard P. Bouwman .90			
	" " " " " " Walter Granow 2.70			
	" " " " " " Esther Beck MacMillan 3.50			
	" " " " " " Walter Warner 3.50			
	" " " " " " Andrew D'Alessandro1.90			
	" " " " " " T.O.Jennings 3.30			
	" " " " " " H.T.Adamson .50			16

DATE	PLEADINGS—PROCEEDINGS	CLERK'S FEES: PLAINTIFF	CLERK'S FEES: DEFENDANT	ATTORNEY'S RECEIPT IN SATISFACTION RETURNED
3-27-53	Filed Wit.Subp. ret'd unexecuted as to James A.Meany 2.60			
	" " " " " " Christ Hoehn -			
	" " " " " " Edwin Brasfield -			
	" " " " " " Patrick J. Cunningham -			
	" " " " " " " " -			
	" " " " " " Meyer Freedman 1.40			
	" " " " " " Movis Park -			
	" " " " " " A. Prestler .40			
	" " " " " " Edward J. Richel 2.00			
	" " " " " " Ben Russelle 1.40			
	" " " " " " Joe Weiglein -			
	" " " " " " Frank L. Wilkie 2.40			
	" " " " " " May Bitel -			
	" " " " " " Bernard Glaser 2.20			
	" " " " " " Arthur Hallstrom 3.00			
	" " " " " " Oscar Kuehn .80			
	" " " " " " James A.Meany 2.80			
	" " " " " " Vasco J. Smith 2.40			
	" " " " " " Morris Ziedenstein -			
	" " " " " " James O'Hara 1.00	E		
3-23-53	Filed Certificate of Distribution Of Decree (Chas.M.Schaub)	1		
3-23-53	Filed Offer Of Proof filed by Plaff concerning Evid.of Vio. Which Occurred Before The Cut-Off Date (4)			
"	Filed Offer Of Proof filed by Pltff Concerning Bidding For The Milk Business At Naval Air Station,Glenview Ill. (2)			
"	Filed Offer Of Proof (Operating coin vending machines by The Bowman Dairy Co . - (1)			
"	Further evid. hd. for pltf .Pltff rests. Further trial of cause contd to March 24, 1953 - Campbell,J			
3-24-53	Mld ntc to attys 3-24-53	d		
	Motion Of Defts The Borden Co.and Belmont Dairy Co. to Strike From The Record As to Them,Evidence Of Acts And Declarations Of Co-Defendants, And Certain Other Evidence (2)			
3-24-53	Motion Of Defendant The Borden Co. To Strike Certain Testimony From The Record As To The Existence Of An Agreement Or The Understanding Between Borden And Other Cos., (4)	d		
3-24-53	Each deft moves for judgt in its favor, at close of pltf's evid.(Deft. Beloit Dairy's mo.being oral-other motions being written) Arguments in part hrd on said motions-Further trial of cause contd to March 25, 1953 -Campbell,J			
	Mld ntc to attys 3-27-53			
3-24-53	Witness Card of Samuel Tertorich pd 4.70			
"	Witness Card of Samuel Pritzman pd 4.14	th		
3-25-53	Witness Card of Christ Hoehn ed.5.26			
3-25-53	Further argmts heard on Deft's motions for judgt in their favor at close of plaf's evidence -Further trial of cause			17

* See Entries after entry of 10-19-53.

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DATE	PROCEEDINGS	CLERK'S FEES		AMOUNT REPORTED IN ENCLOSURE RETURNS
		PLAINTIFF	DEFENDANT	
	contd to March 26, 1953 - Campbell,J			
	Mld ntc to attys 3-30-52			
3-26-53	Further arguments hrd on defts' motions for judgment at close of pltf's evid and concluded. Further trial of cse contd to 2 P.M. March 30, 1953 - Campbell,J			
	Mld ntc to attys 3-30-53 d			
3-30-53	On the Court's opinion handed down in open Court, each deft's motion to dismiss at close of pltf's evidence is granted. Counsel for defts are directed to prepare and file in 15 days proposed findings of fact, conclusions of law and a draft or an order of dismissal. 15 days thereafter, counsel for pltf shall file their observations and suggestions relating thereto. 10 days thereafter, defts may file their reply thereto. Whereupon, the matter of, making findings of fact, conclusions of law and the entry of dismissal order will be taken by the Court-Draft Campbell, J			
	Mld ntc to attys 4-1-53 d			
4-7-53	Filed Notice Of Filing Depositions & Proof Of Service(3) d			
4-14-53	Filed Defendants' Proposed Findings of Fact and conclusions of law (41)			
"	Filed Defendants' Proposed Final Judgment (1)			
4-15-53	Filed Defendant Beloit Dairy Company's Proposed Findings of Fact and Conclusions of law and proof of service (28)			
4-14-53	Filed Notice re proposed findinfs if fact,conclusions of law & final judgt and proof of service d			
4-21-53	Order motion of certain defts to vacate consent decree contd to 4-28-53 before Judge Campbell. - Barnes, J.			
	Mailed notice to attys 4-24-53			
4-21-53	Filed Notice (2)			
"	Filed Motion, Suggestions In Support Of Motion and Ex 'A' (1) (4)			
4-28-53	Motion of defts American Processing & Sales Co., et al to vacate consent decree contd to June 19, 1953 for hearing Campbell,J			
	Mld ntc to attys 4-29-53 d			
4-29-53	Filed Pltf's Observations and Suggestions in reference to Defts' proposed Findings of Fact and Conclusions of Law. (59)			
4-29-53	Filed Notice of Pltff's Observations and Suggestions re Defts' Proposed Findings of Fact and Conclusions of Law, and Proof of Service. (2)			
5-11-53	Filed Notice (1)			
5-11-53	Filed Reply of Defts Bowman and Ridgeview to Pltff's Observations and Suggestions in Reference to Defendants' Proposed Findings and Conclusions (7)			
"	Witness card of Mrs. Mary Darnell - Pd 90¢			
5-11-53	Filed Beloit's Reply to pltff's suggestions as to findings of fact and conclusions of law. 15 pp			

DATE	FILINGS—PROCEEDINGS	CLERK'S FEES PLAINTIFF	CLERK'S FEES DEFENDANT	AMOUNT REPORTED IN EMOLUMENT RETURNS
~~5-12-53~~	~~Filed Notice~~ Error ~~(71)~~ ~~L~~			
" 5/12/53	Filed Notice and Proof of Service, Reply of Defendants Borden and Belmont to Plaintiff's observations and suggestions in reference to defendants' proposed findings and conclusions, and Reply of Borden and Belmont to Plaintiff's Specific observations and suggestions upon the findings and conclusions proposed by Borden, Bowman, Ridgeview and Belmont.		(87) L	
6-27-53	Witness Card of Burnell H. Mathis Pd 8.62 tb			
6-11-53	Witness card of Albert A. Weber Pd. 5.68 d			
6-17-53	Findings of fact, conclusions of law and judgment entd dismissing the cause as to defts. Borden, Bowman, Belmont Ridgeview Farms and Beloit Dairies Draft- Campbell, J J86			
	Mld ntc to attys 6-19-53 d			
6-17-53	Motion of defts. American Processing & Sales Co., et al. to vacate consent decree cont'd. to June 25, 1953 for . hrg.-Campbell, J.			
	Mld. notice to attys. 6-23-53. P			
6-22-53	Delivered C. C. of Find. of F., Con. of Law & Judg. to Anti-trust Div., Dept of Justice. H	2.30	IB	
6-25-53	Order temporarily staying operation of consent decree presented and signed Draft - Campbell, J			
6-25-53	Counsel for pltf informs the Court that he has prepared a motion for a new trial & brief in support thereof which shall be filed on June 26, 1953. Order that on the filing of said motions it is taken under advisement on briefs and written arguments pursuant to Rule 7 of this Court. Opposing brief to be filed in 10 days thereafter. Reply brief 10 days thereafter. Whereupon said motion will be disposed of without oral argument. As to the motion of certain defts to vacate the consent decree, said motion is continued to Sept 25, 1953, and the operation of said decree is stayed until said date. Defts directed to prepare and submit a draft order on the matter of the staying of the operation of the consent decree - Campbell, J			
	Mld ntc to attys 6-29-53 d			
6-26-53	Filed Motion For New Trial -Exhibits attached (4)			
"	Filed Brief In Support Of Plaintiff's Motion For New Trial (11) d			
6-29-53	Filed Notice (1)			
"	Filed Motion Of Defts Bowman & Ridgeview Pursuant To Rule 52 (b) Of The Fed Rule Of Civil Procedure To Amend Certain Findings of Fact Heretofore Entered (4)			
"	Filed Notice and Proof Of Service re motion for new trial etc			
7-2-53	The motion of defts Bowman Dairy Co. and Ridgeview Farms Dairy, Inc. to amend certain of the findings of fact and conclusions of law heretofore entered by the Court, is denied. - Campbell, J.			
	Mailed notice to attys 7-3-53 H			
7-7-53	Mailed copy of Findings of Fact, Conclusions of Law and Judgment entered June 17, 1953 to Attorney General, Washington D.C. d			19

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DATE	PROCEEDINGS	CLERK'S FEES					
		PLAINTIFF		DEFENDANT			
7-6-53	Filed Notice of defts Borden,Belmont,Bowman & Ridgeview						
7-6-53	Filed Brief of defts Borden,Belmont,Bowman & Ridgeview in opposition to pltff's mo for new trial & exhibit (12)						
7-6-53	Filed Mo of defts Borden, Belmont, Bowman & Ridgeview to strike from record certain exhibits attached to pltff's mo. for a new trial.						
7-7-53	Filed Notc & proof of service of brf of deft. Beloit Dairy						
7-6-53	Filed Brief of Beloit Dairy Co. in opposition to pltf's. Motion for new trial. (10) P						
8-6-53	Motion of defts. Borden, Belmont, Bowman & Ridgeview for an order striking from the record certain exhibits attached to pltf's. motion for a new trial is denied. Pltf's. motion for an order that the judgment heretofore entered be set aside and a new trial granted, or, in the alternative, that said judgment be opened, additional testimony taken the findings of fact and conclusions of law amended, and a new judgment entered, is hereby denied-Campbell, J. Mld. notice to attys. 8-6-53. P						
8-21-53	Witness card of Daniel Simms McGuire, paid$ 9;12 E						
9-25-53	Witness card of Henry T. Adamson pd $43.32&						
"	Mo of deft American Process & Sales Co et al to vacate consent decree is by agreement contd generally to be reset on 10 days notice by either side after Supreme Court rules on matter being appealed. Counsel further agree to suspend the operation of the consent decree until after the Supreme Court rules on said appeal- Draft to be submitted by counsel - Campbell, J Mld ntcs 10-1-53 d						
10-2-53	Enter order allowing the appeal as prayed for-DRAFT-Barnes, J. (1) Mld. notices 10-2-53.						
10-2-53	Filed Petition for Appeal by U. S. A. (1)	5	00	DS			
" "	Filed Citation. (1)						
" "	Filed Statement Calling Attention to Provisions of Supreme Court Rule 12 (3) (1)						
" "	Filed Praecipe. (2)						
" "	Filed Assignment of Errors and Prayer for Reversal. (2)						
" "	Filed Statement as to Juriadiction. (39) P						
10-6-53	Filed Subpoena Duces Tecum , retd. served E						
** 3-24-53	Filed Motions to strike testimony of witness Hovey(7) E						
10-9-53	Filed Notice (1)						
"	Filed Motion (1)						
"	Order time for defts to file their Counter Praecipe extended to Oct 27, 1953 Draft - Campbell, J						
"	Order suspending operation of consent decree and continuing motion to vacate consent decree until after Supreme Court determines case on appeal Draft -Campbell,J Mld ntcs 10-12-53 i						
10-12-53	Filed Proof of Service of Appeal papers (1) P						

DATE	FILINGS—PROCEEDINGS	CLERK'S FEES PLAINTIFF	CLERK'S FEES DEFENDANT	AMOUNT REPORTER'S EMOLUMENT RETURNED
10-19-53	Filed Notice And Proof Of Service (1)			
" " "	Filed Motion To Dismiss or Affirm (12)			
" " "	Filed Reply Of Beloit Dairy Co to Appelant's Statement As To Juriediction,And Separate Motion Of Beloit Dairy Co to Dismiss It As An Appellee And To Affirm Judgment Below Dismissing Complaint As To It (13)			
" " "	Filed Notice And Proof Of Service (2) d			
3-24-53	Filed Motion of the Belmont Dairy Co. at the close of plif's. case to dismiss the complt. as to it. (5)			
3-24-53	Filed Motion of the Borden Co. at the close of pltf's. case to dismiss the complt. as to it. (5)			
3-24-53	Filed Four (4) Motions of Bowman Dairy Co. to Dismiss. (1 page each)			
3-24-53	Filed Motion of Ridgeview Farms Dairy Inc. to dismiss. (1)			
3-24-53	Filed Motion of Bowman Dairy Co. & Ridgeview Farms Dairy Inc. to dismiss part of complt. alleging violation of Section 1 of the Sherman Act. (1) (1)			
3-24-53	Filed Motion of Bowman Dairy Co. and Ridgeview Farms Dairy Inc. to dismiss part of complt. alleging violation of Section 2 of the Sherman Act. (1) (1)			
3-24-53	Filed Motion of Bowman Dairy Co. and Ridgeview Farms Dairy Inc. to dismiss part of complt. alleging violation of Section 3 (a) of the Clayton Act. (1) (1) P			
10-27-53	Filed Notice			
	Filed Counter Praecipe of Appellees Borden Co., et al.(2) B			

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25 [FILE ENDORSEMENT OMITTED]

IN

UNITED STATES DISTRICT COURT

Civil Action No. 51 C 947

Equitable Relief Sought

UNITED STATES OF AMERICA,

Plaintiff,

— v. —

THE BORDEN COMPANY; BOWMAN DAIRY COMPANY; AMERICAN PROCESSING AND SALES COMPANY; BELMONT DAIRY COMPANY; BELOIT DAIRY COMPANY; CAPITOL DAIRY COMPANY; HUNDING DAIRY COMPANY; MEADOWMOOR DAIRIES, INC.; RIDGEVIEW FARMS DAIRY, INC.; WESTERN UNITED DAIRY CO.,

Defendants.

Complaint—filed June 18, 1951

The United States of America, by its attorneys, acting under the direction of the Attorney General, brings this complaint against the defendants named herein, and alleges as follows:

I

JURISDICTION AND VENUE

1. This complaint is filed and these proceedings are instituted under Section 4 of the Act of Congress of July 2, 1890, c. 647, 26 Stat. 209, as amended, entitled "An Act To protect trade and commerce against unlawful restraints and monopolies," commonly known as the Sherman Act, and under Section 15 of the Act of Congress of October 15, 1914, c. 323, 38 Stat. 736, as amended, entitled, "An Act To supplement existing laws against unlawful restraints and monopolies and for other purposes," commonly known as the Clayton Act, against the defendants named herein in order to prevent and restrain continuing violations by them of Sections 1 and 2 of the Sherman Act and of Section 2(a) of the Clayton Act as amended.

26 2. All defendants transact business within the Eastern Division of the Northern District of Illinois and are found therein.

II

Description of Defendants

3. The following corporations are hereby named defendants herein. Each is engaged in the business of purchasing, processing, distributing, and selling fluid milk to wholesale customers and other purchasers in the Chicago area and its vicinity.

(a) The Borden Company is a corporation organized and existing under the laws of the State of New Jersey, with offices and principal place of business in New York, New York. It is hereinafter referred to as "Borden."

(b) Bowman Dairy Company is a corporation organized and existing under the laws of the State of Illinois, with offices and principal place of business in Chicago, Illinois. It is hereinafter referred to as "Bowman."

(c) Belmont Dairy Company is a corporation organized and existing under the laws of the State of Illinois, with offices and principal place of business in Chicago. It is a wholly owned subsidiary of Borden. It is hereinafter referred to as "Belmont."

(d) Ridgeview Farms Dairy, Inc. is a corporation organized and existing under the laws of the State of Illinois, with offices and principal place of business in Chicago, Illinois. It is a wholly owned subsidiary of Bowman. It is hereinafter referred to as "Ridgeview."

27 (e) Beloit Dairy Company is a corporation organized and existing under the laws of the State of Illinois, with offices and principal place of business in Chicago, Illinois. It is hereinafter referred to as "Beloit."

(f) Capitol Dairy Company is a corporation organized and existing under the laws of the State of Illinois, with offices and principal place of business in Chicago, Illinois. It is hereinafter referred to as "Capitol."

(g) American Processing and Sales Company is a corporation organized and existing under the laws of the State of Illinois, with offices and principal place

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of business in Chicago, Illinois. Its name, prior to some time in 1943, was Hawthorn-Mellody Farms Dairy, Inc. It is hereinafter referred to as "Hawthorn."

(h) Hunding Dairy Company is a corporation organized and existing under the laws of the State of Illinois, with offices and principal place of business in Chicago, Illinois. It is hereinafter referred to as "Hunding."

(i) Meadowmoor Dairies, Inc. is a corporation organized and existing under the laws of the State of Illinois, with offices and principal place of business at Chicago, Illinois. It is hereinafter referred to as "Meadowmoor."

(j) Western United Dairy Co. is a corporation organized and existing under the laws of the State of Illinois, with offices and principal place of business at Chicago, Illinois. It is hereinafter referred to as "Western United."

28 4. Wherever in this complaint it is alleged that any corporate defendant did any act or thing, such allegation shall be deemed to mean that such act was performed by the officers, agents, or employees of said corporate defendant.

III

Definitions

5. As used in this complaint, the term "fluid milk" means cow's milk sold in fresh fluid form, whether as milk or as cream, or intermixtures thereof.

6. As used in this complaint, the term "distributor" means a person, firm, corporation, or cooperative engaged in the business of purchasing, pasteurizing, processing, bottling, and selling fluid milk.

7. As used in this complaint, the term "vendor" means a person, firm, or corporation engaged in the business of buying fluid milk from a distributor for resale to wholesale customers or others.

8. As used herein, the term "wholesale customers" means those customers for fluid milk who buy from a distributor or from a vendor for resale to consumers.

9. As used herein, the term "store wholesale customer" means a customer for fluid milk who buys from a distributor or from a vendor for resale to consumers for consumption off the premises of the store wholesale customer.

10. As used herein, the term "public institutions" means the following federal, county, and municipal institutions within the Chicago area and its vicinity:

Federal Institutions

The United States Marine Hospital
Chicago, Illinois;
The United States Veterans Administration Hospital,
Hines, Illinois;
29 The United States Navy installations at Great Lakes,
Illinois and at Navy Pier, Chicago, Illinois, and at
Navy Reserve Armory, Chicago, Illinois;
The United States Army installations at Fort Sheridan, Illinois, and at Vaughan General Hospital, Hines, Illinois, and the United States Army, Quartermaster Market Center, Chicago, Illinois;

County Institutions

The Cook County Jail, The Cook County Juvenile Detention Home, and The Cook County Hospital, all of Chicago, Illinois;
The Cook County Oak Forest Infirmary
Blue Island, Illinois;

Municipal Institutions

The Municipal Tuberculosis Sanitarium,
Chicago, Illinois

11. As used in this complaint, the words "Chicago area" mean the territory lying within the corporate limits of the cities of Chicago and Evanston, and the territory lying within the corporate limits of the villages of Wilmette, Kenilworth, Winnetka, Glencoe, and Oak Park, all in the State of Illinois.

IV

Nature of Trade and Commerce and the Position of the Defendants in the Industry

12. The Chicago area has a popuiation of over 4,000,000 persons and is one of the largest milk consuming markets in the United States. Thus, in 1950, over a half billion quarts of fluid milk were distributed and sold in the Chicago area, with approximately 60 per cent of such fluid milk having been produced in the States of Wisconsin,

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Indiana, and Michigan, and the remainder being produced in Illinois.

13. The defendants ship into the Chicago area or purchase from others substantial quantities of fluid milk produced by dairy farmers located in Wisconsin, Michigan, and Indiana. This milk, in the course of a continu-
30 ous flow of interstate trade and commerce, passes through the bottling and pasteurizing plants of the defendants, is commingled with milk produced in Illinois, and is sold by the defendants to wholesale customers, public institutions, and others in the Chicago area. Approximately 60 per cent of the commingled fluid milk thus sold by the defendants come from dairy farmers located in States other than Illinois.

14. Fluid milk is by its nature perishable. It cannot be stored and must reach the consumer within a short time after production. Sales to consumers within the city of Chicago are required, by city ordinances, to be made within a limited number of hours after the milk is delivered by a dairy farmer to a receiving station. The purchase and receipt of said fluid milk in states other than Illinois, its transportation into the State of Illinois, its pasteurizing, processing, and bottling, and its sale and distribution to wholesale customers and public institutions in the Chicago area and its vicinity by distributors, including defendant distributors, has constituted, and does constitute, interstate trade and commerce in fluid milk between states other than Illinois and the State of Illinois.

15. Total wholesale and retail sales of fluid milk in the Chicago area in 1950 by all distributors were in excess of 148 million dollars. The defendants sold approximately 65 per cent of this total.

16. Total sales of fluid milk in 1950 by all distributors to wholesale customers and public institutions in the Chicago area were in excess of 80 million dollars, of which the defendant distributors sold in excess of 80 per cent of the total.

17. The dominant distributors of fluid milk to wholesale customers and public institutions in the Chicago area are defendants Bowman and Borden. The combined sales of Bowman, Borden, and their respective wholly owned subsidiaries, Ridgeview and Belmont, to said whole-
31 sale customers and public institutions amounted to more than 50 million dollars, or approximately 60 per cent of the total of such sales by all distributors in the Chicago area.

18. In 1950 Bowman had sales to wholesale customers and public institutions in the Chicago area of approximately 30 million dollars of fluid milk. In addition, Bowman's wholly-owned subsidiary Ridgeview had sales of fluid milk in 1950 of approximately $1,900,000, of which almost all were to wholesale customers. The combined sales of Bowman and Ridgeview to wholesale customers and public institutions in 1950 amounted to approximately 38 per cent of the total of such sales by all distributors in the Chicago area.

19. In 1950 Borden had sales to wholesale customers and public institutions in the Chicago area of approximately 17 million dollars of fluid milk. In addition, Borden's wholly-owned subsidiary Belmont had sales in 1950 of fluid milk of approximately 900 thousand dollars, of which almost all were to wholesale customers. The combined sales of fluid milk by Borden and Belmont to wholesale customers and public institutions in 1950 amounted to approximately 22 per cent of the total of all such sales by all distributors in the Chicago area.

20. Defendants Beloit, Capitol, Hawthorn, Hunding, Meadowmoor, and Western United had combined sales to wholesale customers and public institutions in the Chicago area of approximately 18 million dollars in 1950, which amounted to approximately 23 per cent of the total of such sales by all distributors. The largest of the aforesaid defendants had sales to wholesale customers and public institutions in the Chicago area not in excess of 6 per cent of the total of such sales by all distributors.

21. There are, in addition to the ten defendants,
32 approximately thirty other milk distributors in the Chicago area whose combined sales of fluid milk to wholesale customers and public institutions were not in excess of 20 per cent of the total of such sales by all distributors. The largest of such non-defendant distributors had sales to wholesale customers not in excess of 5 per cent of the total of such sales by all distributors.

22. A significant factor in the growth of Bowman and Borden to their present dominant position in the distribution and sale of fluid milk in the Chicago area has been the policies followed by both companies in purchasing and absorbing the businesses and customer outlets of competitive distributors. During the period from January 1, 1928 to January 1, 1940, Bowman and Borden acquired by pur-

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chase approximately 44 distributors of fluid milk who had previously sold in competition with Bowman and Borden in the Chicago area.

23. Bowman acquired, during the 1928 to 1940 period, the following competing distributors for which it paid, in aggregate, approximately $5,400,000:

Date of Acquisition	Name of Distributor
January 4, 1928	Bolas Condensed Milk Co.
February 3, 1928	Ira J. Mix Dairy Co.
March 30, 1928	Frank P. Merkle Dairy Co.
February 28, 1929	Murphy-Ward Dairy Co.
June 30, 1929	Forest Glen-National Milk Co.
July 2, 1929	A. Johnson & Co.
July 2, 1929	John Wenzel
July 8, 1929	George T. Sampson
July 31, 1929	Eich Dairy Co.
October 1, 1930	Herbert Oehlerking
October 13, 1935	Yore Bros. Dairy Co.
February 2, 1936	Averill Milk Products Co.
33 June 19, 1936	Maple Brook Farms
May 1, 1937	Mohawk Dairy Co.
February 11, 1938	Natoma Farm
November 1, 1939	Ratcliffe Bros. Creamery Co.

24. During the same 1928 to 1940 period, Borden acquired the following competing distributors for which it paid, in aggregate, approximately $20,000,000 in cash or stock (market value) of Borden, or both:

Date of Acquisition	Name of Distributor
1928	Koenig Dairy Co., Inc.
1928	J. M. Barron & Sons
1928	Wieland Dairy Co.
1928	A. J. Olson Co.
1928	Christiansen Bros. Dairy Co.
1928	Greenview Farm Dairy Co.
1928	J. D. Broxham Dairy Co.
1928	Clover Leaf Milk Co.
1929	Des Plaines Dairy Co.
1929	Galloway West Co.
1929	Hammond Dairy Co.
1929	Central Dairy Products Co.
1929	Arlington Heights Dairy Co.
1929	Borgen's Dairy Co.
1929	Irving Park Dairy Co.

Date of Acquisition	Name of Distributor
1929	Logan Square Dairy Co.
1929	Rascher Dairy Co.
1929	Benson Dairy Co.
1929	C. Carlsen Dairy Co.
1929	Hohefelder Dairy Co.
34 1929	Winnetka Sanitary Dairy Co.
1930	Curran & Fox Dairy Co.
1930	Bagel Bros. Dairy Co.
1930	Rabe Dairy, Inc.
1931	Marley Dairy, Inc.
1932	Crown Dairy Products Co.
1936	Swiss Dairy Co.
1937	Park Manor Milk Products Co.

25. As hereinafter more fully alleged in paragraphs 35 through 40, Bowman and Borden, during the period from January 1, 1940 to the date of the filing of this complaint, have continued to acquire the businesses and customer outlets of distributors who previously sold fluid milk in competition with Bowman and Borden.

V

Offenses Charged

A. *Violations of Sections 1 and 2 of the Sherman Act*

26. From about 1940 and continuing to the date of the filing of this complaint, the defendants have been and are now engaged in a combination and conspiracy to restrain and to monopolize, and have monopolized, the aforesaid interstate trade and commerce in the sale of fluid milk to wholesale customers and public institutions in the Chicago area, in violation of Sections 1 and 2 of the Sherman Act (15 U.S.C. §§ 1 and 2). The defendants are continuing, threatening to continue, and will continue the aforesaid offenses unless the relief hereinafter prayed for is granted.

27. The aforesaid combination and conspiracy has consisted of a continuing understanding and concert of action among the defendants, the substantial terms of which have been:

(a) That each defendant refrain from competing for the fluid milk business of the wholesale customers of another defendant;

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35 (b) That each defendant offer inducements such as discriminatory prices, rebates, discounts, lump sum cash payments, interest-free loans, or the furnishing of store equipment or other gratuities to wholesale customers of non-defendant distributors of fluid milk to cause said customers to discontinue their purchases of fluid milk from said non-defendant distributors and to purchase fluid milk from the defendant offering such inducement;

(c) That each defendant induce its store wholesale customers to agree to maintain the retail prices "suggested" by the defendants;

(d) That the defendants Bowman and Borden maintain and enhance their dominant market position by acquiring the businesses, including customer outlets, of competing distributors;

(e) That defendants Bowman and Borden organize and operate "fighting companies" in order to suppress and destroy the competition of non-defendant distributors;

(f) That the defendants collusively allocate and share among themselves the business of selling fluid milk to public institutions;

(g) That the defendants agree upon, fix, and maintain prices for the sale of fluid milk to public institutions by submitting prearranged, bogus, and collusive bids for the sale of fluid milk to such institutions.

28. During the period of time covered by this complaint and for the purpose of monopolizing and of forming
36 and executing the aforesaid combination and conspiracy to restrain and monopolize the said interstate trade and commerce, the defendants, by common understanding and concert of action, have done, among others, the following acts and things:

Allocation of Wholesale Customers

29. During the period of time covered by this conspiracy, defendants Bowman, Borden, Ridgeview, Belmont, Beloit, Capitol, Hunding, Meadowmoor, and Western United have, by agreement and understanding among themselves, refrained from competing for the fluid milk business of each other's wholesale customers. During 1940 and 1941, Hawthorn was not a party to such agreement and under-

standing but engaged in active solicitation of the fluid milk business of the wholesale customers served by the other defendant distributors. Bowman, Ridgeview, and others of the defendants retaliated against Hawthorn by a concentrated and selective solicitation aimed at the wholesale customers served by Hawthorn and offered such customers fluid milk at preferential and "cut" prices. As a result of such "price war," Hawthorn's fluid milk business was rendered unprofitable and Hawthorn was forced to enter into negotiations with Bowman and the other defendants to obtain a termination of hostilities. Such negotiations resulted in Hawthorn's becoming a participant in the combination and conspiracy. Hawthorn agreed to refrain from attempting to secure the fluid milk business of wholesale customers served by one or more of the defendant distributors, and in return, the other defendants agreed to refrain from attempting to secure the fluid milk business of wholesale customers served by Hawthorn.

"Stop Buying"

30. The defendants have concertedly engaged in the practice known in the industry as "stop buying." In doing this, the defendants, by agreement and understanding among themselves, have solicited the fluid milk business of wholesale customers of non-defendant distributors with offers of various secret inducements involving discriminatory prices, rebates, discounts, interest-free loans, free store equipment, and substantial lump sum cash payments and other gratuities. These discriminatory and preferential inducements have been given on the condition that the wholesale customer agree to purchase his requirements of fluid milk exclusively from the defendant offering the inducement and refrain from purchasing fluid milk from any distributor other than said defendant and, in respect to store wholesale customers, on the further understanding that the store wholesale customer agree not to reduce his prices to consumers below those store prices which all of the defendants "suggest" to their store wholesale customers. The defendants have policed the operations of their store wholesale customers to detect any sales of milk to consumers at prices below those suggested by the defendants.

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31. A variation of the stop buying practice exists with reference to so-called "split stops," i.e., those wholesale customers who follow the practice of purchasing their fluid milk requirements from more than one distributor. Where

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one of the distributors is a defendant and the other is a non-defendant, other defendants have limited their stop buying activities to that portion of the business handled by the non-defendant and have not attempted to secure the remaining portion of the business handled by a defendant.

32. The defendants Bowman and Borden have utilized secret codes to record the lump sum cash payments made in connection with their stop buying activities and have systematically destroyed other records which would disclose the identities of wholesale customers receiving cash payments and the amounts paid to such customers.

33. The defendants have implemented their understanding not to compete for each other's wholesale customers by adoption of rules, instructions, and practices governing solicitation of wholesale customers by defendants' respective contact men or solicitors. Defendants have in-
38 structed and ordered their respective solicitors not to solicit the wholesale customers of another defendant. In respect to store wholesale customers, defendants have instructed their respective solicitors that when such a customer of one of the defendants has ceased doing business and has reopened within 30 days under either new or old management and the store fixtures have not been removed from the premises, none of the defendants, except the defendant previously selling the customer, may attempt to secure the patronage of said customer. Pursuant to the aforementioned instructions, solicitors of the defendants have refrained from soliciting wholesale customers of another defendant and have declined to serve such customers, inventing various fictitious and untrue excuses for declining such business.

34. Defendants have arranged a system of trading the business of dissatisfied wholesale customers where the defendant formerly supplying such customer has been unable to retain the customer's patronage. Such trading has been arranged by the defendants to prevent such customers from giving their patronage to non-defendant distributors.

Bowman and Borden Acquisitions

35. As part of the conspiracy to allocate among themselves wholesale milk customers in the Chicago area, the defendants have recognized each defendant's right to acquire and retain the exclusive patronage of the customers

of a distributor whose business has been purchased by one of the defendants.

36. Assisted by this understanding, Bowman has acquired, since January 1, 1940, by purchase, the business, physical assets, and customer outlets of the following competing distributors operating in the Chicago area and its vicinity:

Date of Acquisition	Name of Distributor
July 10, 1940	Honey Hill Creamery Co. (retail business only)
October 13, 1941	Westbrook Farms Dairy, Inc.
April 1, 1942	Austin Dairy
39 July 1, 1942	Harding Bros. and Williams
December 27, 1942	Sefcik Dairy Co.
June 7, 1943	Royal Dairy Company
June 10, 1943	Wencel's Dairy Products
October 1, 1943	Clearing Dairy Company
December 23, 1943	Reiter Dairy
June 30, 1944	Nieman Dairy
July 19, 1944	Lemont Dairy
December 28, 1945	Algrim Dairy
June 1, 1946	Round Lake Creamery Co.
June 30, 1946	Voss Dairy Co.
December 8, 1946	Capitol Dairy Company (retail business only)
January 3, 1947	M. G. Rudzinski

37. Assisted by the aforesaid understanding, Borden has acquired, since January 1, 1940, by purchase, the business, physical assets, and customer outlets of the following competing distributors operating in the Chicago area and its vicinity:

Date of Acquisition	Name of Distributor
April 20, 1940	Belmont Farm Products, Inc.
September 25, 1940	C. W. Spivey
June 14, 1941	Sunderman Farm & Dairy Products, Inc.
1942	Modern Dairy

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Date of Acquisition	Name of Distributor
March 16, 1943	La Grange Dairy
August 1, 1943	Mandel Bros. Dairy
August 15, 1943	Cornell Dairy
December 28, 1943	Marquette Dairy Company, Inc.
December 30, 1943	Pure Dairy Products Company
February 1, 1944	P. F. Demarais Dairy
February 16, 1944	A. Demarais & Son
October 27, 1944	Brucer Dairy
February 1, 1945	Snow White Dairy Company
December 1, 1945	City Sanitary Milk Company
March 1, 1946	Forest Glen Dairy Company
April 16, 1947	Devine's Dairy

38. In a number of the said acquisitions, the defendant acquiring the distributor, by the contract of purchase, has conditioned payment for the business and assets of said distributor upon the retention by the defendant of the existing volume of milk sales of the purchased distributor. The purposes of defendants Bowman and Borden in making such acquisitions were, in many instances, to obtain the seller's share of the Chicago area fluid milk market and to eliminate distributors whose price cutting policies threatened the defendant's scheme of customer allocation and price stabilization. The purchase price paid by either defendant Bowman or defendant Borden in the acquisition of a distributor was, in many cases, influenced by the extent to which the distributor offered price competition or threatened the defendants' customer allocations.

39. In making acquisitions of distributors, defendants Bowman and Borden regularly have required the seller to execute a covenant not to engage in the fluid milk business in competition with the defendant purchaser. In addition, for the purpose of assuring the transfer and retention of the customers formerly served by the acquired distributor, defendants Bowman and Borden, in a number of instances, have provided in the terms of purchase for the employment by the purchaser of the manager or owner of the seller.

40. A number of the distributors so acquired by defendants Bowman and Borden were companies whose cus-

tomers were principally vendors. In such acquisitions, the other defendants recognized the right of the defendant purchaser to supply exclusively such vendors.

The Operation of "Fighting" Companies

41. Bowman and Borden have each organized and operated a "fighting company" in order to suppress and destroy the competition of non-defendant distributors.

41 42. In or about November 1939, Bowman purchased the business of a distributor known as Ratcliffe Bros. Creamery Co. and in February or March 1940 transferred the assets of said company to its newly organized subsidiary, defendant Ridgeview Farms Dairy, Inc. Bowman concealed its ownership of Ridgeview from other milk distributors with the exception of other defendant distributors who were given assurances that Ridgeview would not be permitted to compete with them. Pursuant to the directions of Bowman, Ridgeview has embarked on predatory price cutting and stop buying for the purpose of injuring or destroying non-defendant distributors who sold fluid milk at reduced prices in multi-quart containers or who solicited the patronage of Bowman customers.

43. Borden organized, in or about April 1940, its wholly-owned subsidiary, defendant Belmont Dairy Company. Borden concealed its ownership of Belmont from other milk distributors with the exception of other defendant distributors who were given assurances that Belmont would not be permitted to compete with them. Pursuant to the directions of Borden, Belmont has embarked on predatory price cutting and stop buying for the purpose of injuring or destroying independent distributors who sold fluid milk at reduced prices in multi-quart containers or who solicited the patronage of Borden customers.

Collusive Bids to Public Institutions

44. The defendants have allocated or attempted to allocate among themselves the sales of fluid milk to public institutions in the Chicago area and its vicinity by means of a scheme involving the use of prearranged bogus and collusive bids. The defendants have submitted such bids in making sales of fluid milk to the following institutions: Chicago Municipal Tuberculosis Sanitarium, the Cook County Jail, the Cook County Juvenile Detention Home, and the Cook County Hospital, all in Chicago, Illinois,

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to the Cook County Oak Forest Infirmary, Blue Island,
42 Illinois, to the United States Marine Hospital, Chicago, Illinois, to the United States Veterans Administration Hospital, Hines, Illinois, to the United States Navy for delivery to the Naval Hospital, Great Lakes, Illinois, for delivery at the Naval Training Station, Great Lakes, Illinois, for delivery at the Naval Training School, Navy Pier, Chicago, Illinois (until the closing of that installation in 1946), and for delivery at Navy Training School, Naval Reserve Armory, Chicago, Illinois, and to the United States Army for delivery at Ft. Sheridan, Ft. Sheridan, Illinois, and for delivery at Vaughan General Hospital, Hines, Illinois (prior to the time such hospital was merged with the United States Veterans Administration Hospital at Hines, Illinois), and to the United States Army for delivery during the years 1943 and 1944 to various Army and Navy Camps and installations located in the Southern section of the United States whose purchases of fluid milk were made through the United States Army, Quartermaster Market Center, Chicago, Illinois.

Reprisals

45. In order to discourage and prevent other distributors of fluid milk from disrupting the prearranged allocation of the aforementioned institutional business, the defendants have threatened reprisals and have engaged in reprisals against distributors who have submitted bids to one or more of the above-mentioned public institutions. Such reprisals have usually taken the form of an intensified stop buying program directed at the wholesale customers of the interloping distributors.

B. *Violations of Section 2(a) of the Clayton Act as Amended*

46. Beginning in or about January 1941, and continuing up to the date of the filing of this complaint, each of the defendants has sold and is continuing to sell for resale fluid milk in interstate trade and commerce to different wholesale purchasers in the Chicago area at prices which discriminate between said purchasers of fluid milk of like
grade and quality, and the effect of such discrimina-
43 tion may have been and may continue to be to substantially lessen competition or tend to create a monopoly in the sale of fluid milk to wholesale purchasers in the Chicago area or to injure, destroy or prevent competi-

tion between the aforesaid wholesale purchasers knowingly receiving the benefit of such price discriminations and other wholesale customers not receiving the benefit of such discriminations, in violation of Section 2(a) of the Clayton Act, as amended (38 Stat. 730, 49 Stat. 1526, 15 U.S.C. Sec. 13(a). The defendants are continuing, threatening to continue, and will continue the aforesaid offenses unless the relief hereinafter prayed for is granted.

47. The aforesaid discriminations in price have been granted, often secretly, in the form of preferential prices, discounts, rebates, lump sum cash payments, installment cash sums, and interest-free loans.

VI

Effects of the Monopolization and the Combination and Conspiracy

48. The combination and conspiracy to restrain and to monopolize, and the monopolization of, interstate trade and commerce in the distribution and sale of fluid milk has had the following effects:

(a) The defendants Borden and Bowman have achieved and maintained effective monopoly control over the distribution and sale of fluid milk to wholesale customers and public institutions in the Chicago area by inducing the other defendants to participate in and maintain the collusive allocation of wholesale customers and public institutions, by organizing and operating "fighting" companies, by eliminating competition through stop buying, by allocating wholesale customers and public institutions and by absorbing competing distributors;

(b) Competing non-defendant distributors have been eliminated from the business of distributing and selling fluid milk to wholesale customers and public institutions;

44 (c) Non-defendant distributors have been intimidated by the defendants' predatory acts and practices from competing for the business of selling fluid milk to wholesale purchasers and public institutions;

(d) Competition in the distribution and sale of fluid milk to wholesale customers and public institutions has been restrained and suppressed;

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(e) The business of selling fluid milk to public institutions has been allocated among the defendants and said public institutions have been deprived of the benefits of competitive bidding.

45 PRAYER

WHEREFORE, plaintiff prays:

1. That the combination and conspiracy to restrain and to monopolize the interstate trade and commerce, hereinabove alleged, be adjudged and decreed to be in violation of Sections 1 and 2 of the Sherman Act.

2. That the defendants be adjudged and decreed to have monopolized the interstate trade and commerce, hereinabove alleged, in violation of Section 2 of the Sherman Act.

3. That the discriminations in price for fluid milk of like grade and quality, which each of the defendants has granted to certain of its wholesale customers and not to other of its wholesale customers, be adjudged and decreed to be in violation of Section 2(a) of the Clayton Act, as amended.

4. That the defendants, individually and collectively, be perpetually enjoined and restrained from continuing the aforesaid discriminations and from carrying out, directly or indirectly, the combination and conspiracy to restrain and to monopolize, and the monopolization of trade and commerce, as hereinbefore alleged, or any similar discrimination, or any combination or conspiracy having a similar purpose or effect.

5. That the defendant Borden be required to dispose of its entire interest in defendant Belmont to parties who are not named as defendants in this case, and who are not owned or controlled by, or affiliated with, any defendant herein or the successor of any defendant.

6. That the Court require defendant Borden to submit a plan for the divestiture of such of its plants, facilities and other assets, used by the Chicago Milk Division of defendant Borden, as is necessary to restore effective competition in the distribution and sale of fluid milk to wholesale customers and public institutions in the Chicago area.

46 7. That the defendant Bowman be required to dispose of its entire interest in defendant Ridgeview to parties who are not named as defendants in this case,

and who are not owned or controlled by, or affiliated with, any defendant herein or the successor of any defendant.

8. That the Court require defendant Bowman to submit a plan for the divestiture of such of its plants, facilities and other assets, used by defendant Bowman, as is necessary to restore effective competition in the distribution and sale of fluid milk to wholesale customers and public institutions in the Chicago area.

9. That the agreements, understandings, arrangements and practices of the defendants, hereinabove alleged, be ordered terminated and cancelled and each of the defendants be perpetually enjoined from entering into or participating in any agreement or plan to do or cause to be done any of the acts and practices herein alleged to have been agreed upon and done by defendants in furtherance of the aforesaid combination and conspiracy.

10. That defendants, jointly and severally, be perpetually enjoined from, in any manner, offering or giving to any existing or prospective wholesale customer any preferential or discriminatory price, discount, rebate, lump sum cash payment, installment cash sum, interest free loan or other gratuity.

11. That each of the defendants be required to submit, as part of any bid for the sale of fluid milk to any public institution or any other institution purchasing fluid milk by means of competitive bids, an affidavit of the officer or agent signing the bid on behalf of the defendant certifying that such bid has been compiled and submitted without consultation, agreement, understanding or collusion on the part of the defendant with any other distributor of fluid milk.

47 12. That the plaintiff have such other further, general and different relief as the nature of the case may require and as the Court may deem proper in the premises.

13. That the plaintiff recover its taxable costs.

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48 * * * * *

49 [FILE ENDORSEMENT OMITTED]

IN

UNITED STATES DISTRICT COURT

Civil Action No. 51 C 947

UNITED STATES OF AMERICA,

Plaintiff,

— VS. —

THE BORDEN COMPANY, *et al.*,

Defendants.

Final Judgment—filed February 19, 1953

Plaintiff, United States of America, having filed its complaint herein on June 18, 1951, and the defendants, American Processing and Sales Company, Capitol Dairy Company, Hunding Dairy Company, Meadowmoor Dairies, Inc., and Western United Dairy Co. (which defendants are hereinafter referred to collectively as the "consenting defendants"), and each of them, having appeared and filed their answers to said complaint denying the substantive allegations thereof; and the plaintiff and the consenting defendants, by their respective attorneys, having severally con-

sented to the entry of this Final Judgment without trial or adjudication of any issue of fact or law herein, and without admission by any party in respect of any such issue;

Now, Therefore, before the taking of any testimony and without trial or adjudication of any issue of fact or law herein, and upon consent as aforesaid of the plaintiff and the consenting defendants,

IT IS HEREBY ORDERED, ADJUDGED AND DECREED as follows:

I

This Court has jurisdiction of the subject matter hereof and of the plaintiff and consenting defendants. The complaint states a cause of action against the consenting defendants under Sections 1 and 2 of the Act of Congress of July 2, 1890, entitled "An Act to Protect Trade and Commerce Against Unlawful Acts and Monopolies," commonly known as the Sherman Act, and under Section 2(a) of the Act of Congress of October 15, 1914, entitled "An Act to Supplement Existing Laws Against Unlawful Restraints and Monopolies and for Other Purposes," commonly known as the Clayton Act, and acts amendatory thereof and supplemental thereto.

II

DEFINITIONS

As used in this Final Judgment:

(A) "Fluid Milk" means cow's milk sold in fresh fluid form, whether as milk or as cream, or inter-mixtures thereof;

(B) "Distributor" means any person engaged in the business of purchasing, pasteurizing, processing, bottling, and selling fluid milk;

(C) "Vendor" means any person engaged in the business of buying fluid milk from a distributor for resale to wholesale customers or others;

(D) "Wholesale customers" means vendors and those customers for fluid milk who buy from a distributor or from a vendor for resale purposes. It also includes hotels, restaurants and other eating places purchasing milk for resale to consumers;

(E) "Public Institutions" means any federal, state, county or municipal institution;

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(F) "Person" shall mean an individual, partnership, firm, association, corporation, cooperative or any other legal entity.

III

The provisions of this Judgment applicable to any consenting defendant shall apply to such defendant, its successors, subsidiaries, assigns, officers, directors, agents and employees, and to all other persons acting or claiming to act under, through or for such defendant. Such provisions shall apply only to those activities of such defendant, in the counties of Cook, DuPage and Lake in Illinois, and Lake County, Indiana.

IV

Each of the consenting defendants is enjoined and restrained from:

(A) Entering into, adhering to or maintaining any combination, conspiracy, contract, agreement, understanding plan or program, directly or indirectly, with any other distributor or vendor for the purpose or with the effect of:

(1) Allocating or dividing customers, territories or markets for the sale of fluid milk;

(2) Adopting, maintaining, enforcing or adhering to rules, instructions or practices governing the solicitation of wholesale customers or public institutions by contact men or solicitors;

(3) Refusing to submit a bid for the sale of fluid milk or making a bid therefor higher than, or identical with, the bid of any other person, or to submit collusively a bid therefor.

Nothing contained in this Section IV (A) shall prevent a consenting defendant from contracting with a vendor to service a particular route or territory, provided that the right of such vendor to sell in other territories or upon other routes is not directly or indirectly restricted thereby;

(B) Selling or offering to sell fluid milk of like grade or quality to a wholesale customer, other than a non-profit institution, at prices which discriminate against other customers of the seller or on such terms or conditions as involve lump sum cash payments, interest free loans, store

equipment (or non-compensated use thereof), gratuities or other similar inducements, or discriminatory rebates, discounts or advertising service charges.

Upon proof being made, at any hearing on a complaint by the plaintiff under this Section IV (B) that a defendant has sold or offered to sell fluid milk at prices, terms or conditions, as aforesaid, the burden of rebutting the prima-facie case thus made shall be upon the defendant so charged; Provided, however, that nothing herein contained shall prevent such defendant from rebutting the prima facie case thus made by showing that such prices, terms or conditions were made lawfully and in good faith in order to meet equally low prices, terms or conditions offered or given by a competitor, or that the price differentials offered or
52 given made only due allowance for differences in the cost of sale or delivery resulting from differing methods or quantities in which the fluid milk was sold or delivered to such customer;

(C) Entering into, adhering to, continuing or claiming any rights for the sale of fluid milk under any contract, agreement or understanding, the consideration for which was or is a gift, payment or loan of any property of value;

(D) Entering into any contract, agreement or understanding which has the purpose or effect of determining, fixing, maintaining, adhering to, or inducing the adherence to, prices, price lists, differentials, discounts or other terms or conditions of sale for fluid milk sold to third persons;

(E) Selling or offering to sell fluid milk on the basis, agreement or understanding that the purchaser thereof shall not purchase or deal in fluid milk obtained from any other source, except in contracts the duration of which does not exceed one year;

(F) Refusing, directly or indirectly, to sell fluid milk to any person on the grounds that such person has purchased or is purchasing fluid milk from any other source;

(G) Ordering, directing or instructing its solicitors or contact men not to solicit the fluid milk business of any person because such person is or has been purchasing fluid milk from another source;

(H) Communicating, directly or indirectly, to any other distributor or vendor other than a vendor selling fluid milk purchased from such distributor the name of any person to whom such defendant is or has been selling fluid milk;

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(I) Inducing, attempting to induce, or requesting any labor union, through its officers, members or agents to coerce or prevent, or to attempt to coerce or to prevent any wholesale customer from selling fluid milk except at prices established or determined by any person other than said wholesale customer;

(J) Compelling, inducing or requesting any wholesale customer not to advertise prices for the sale of fluid milk;

53 (K) Printing, writing or distributing any resale price list containing suggested out-of-store prices to the public for fluid milk, provided that the provisions of this subsection (K) shall not prohibit lawful newspaper advertising.

V

Each of the consenting defendants is hereby ordered and directed:

(A) To submit, as part of any bid for the sale of fluid milk to any public institution, an affidavit of the officer or agent of such defendant signing the bid, certifying that such bid has been compiled and is submitted without discussion, agreement, understanding or collusion on the part of the defendant submitting the same with any other distributor or vendor;

(B) To keep and maintain, in orderly classification, for a period of three (3) years after the date of submission, a copy of each bid for the sale of fluid milk submitted by it to a public institution, and a list of such bids showing the date on which, and the name of the public institution to which, the respective bids were submitted.

VI

Each of the consenting defendants is ordered and directed to:

(A) Keep and maintain route books or other records, for a period of three (3) years after making the entries therein, showing the prices at which fluid milk is sold and delivered to each wholesale customer after the date of entry of this Final Judgment;

(B) Keep and maintain, for a period of three (3) years after the making thereof, every permanent record and every record of solicitation of wholesale customers kept in the ordinary course of business;

(C) Distribute to each of its officers, agents and employees, engaged in selling fluid milk to wholesale customers, a copy of this Final Judgment and to file with the Clerk of this Court and with the Attorney General of the United States within thirty (30) days after the date of entry of this Final Judgment an affidavit of an officer of said defendant to the effect that such distribution has been made;

(D) File with the Attorney General of the United States within thirty (30) days after the entry of this Final
54 Judgment, to be used only for the purpose of securing compliance with this Final Judgment, a duly certified list showing each and every loan by such defendant to its store, restaurant or hotel customers then outstanding and unpaid, in whole or in part, of money, credit, fixtures, equipment, merchandise, facilities or other property of value, and each and every transaction of purchase or loan of fixtures, equipment, merchandise, facilities or other property of value, tangible or intangible, entered into with others by a store, restaurant, or hotel customer of such defendant where such purchase or loan is still outstanding and unpaid, in whole or in part, and in respect of which such defendant is an accommodation endorser or guarantor.

VII

For the purpose of securing compliance with this Final Judgment, duly authorized representatives of the Department of Justice shall upon written request of the Attorney General, or the Assistant Attorney General in charge of the Antitrust Division, and on reasonable notice to any consenting defendant, made to its principal office, be permitted,

(a) Access, during the office hours of such defendant, to all books, ledgers, accounts, correspondence, memoranda, and other records and documents in the possession or under the control of such defendant, relating to any of the matters contained in this Final Judgment, and

(b) Subject to the reasonable convenience of such defendant, and without restraint or interference from it, to interview officers or employees of such defendant, who may have counsel present, regarding any such matters, and

Upon request the defendant shall submit such reports in writing with respect to any of the matters contained in this

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Final Judgment as from time to time may be necessary to the enforcement of this Final Judgment. No information obtained by the means permitted in this Section VII shall be divulged by any representative of the Department of Justice to any person other than a duly authorized representative of the Department except in the course of legal proceedings to which the United States is a party for the purpose of securing compliance with this Final Judgment or as otherwise required by law.

55 VIII

Jurisdiction of this action is retained for the purpose of enabling any of the parties to this Final Judgment to apply to the Court at any time for such further orders and directions as may be necessary or appropriate for the construction or carrying out of this Final Judgment, for the modification of any of the provisions thereof or for the enforcement of compliance therewith and the punishment of violations thereof.

ENTER:

CAMPBELL
Judge

We hereby consent to the entry of the foregoing Final Judgment.

For the Plaintiff:

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Edward P. Hodges
Acting Assistant Attorney General

EDWIN H. PEWETT
Edwin H. Pewett
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W. D. KILGORE, JR.
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CHARLES F. B. MCALEER
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For the Defendants:

AMERICAN PROCESSING AND SALES COMPANY

By HERMAN A. FISCHER
Its Attorney

CAPITOL DAIRY COMPANY

By ISADORE FRIED
Its Attorney

HUNDING DAIRY COMPANY
By THOMAS B. GILMORE
Its Attorney

MEADOWMOOR DAIRIES, INC.
By CHARLES W. SCHAUB
Its Attorney

WESTERN UNITED DAIRY CO.
By THOMAS B. GILMORE
Its Attorney

56 * * * * *

57 IN
UNITED STATES DISTRICT COURT
No. 51 C 947

UNITED STATES OF AMERICA,
Plaintiff,
— VS. —
THE BORDEN COMPANY, *et al.*,
Defendants.

Opinion and Order—filed February 27, 1953

The Court having heard argument of counsel for defendants in support of a limitation of the period of inquiry in this cause to the period after September 16, 1940, and having heard argument of counsel for the United States in opposition thereto and having considered the complaint in this cause, the complaint in the cause of United States v. The Borden Company et al., No. 2088, filed in this Court on September 14, 1940, and the Consent Decree entered in said cause on September 16, 1940, and being fully advised in the premises, renders the following Opinion and Order:

The matter now before us is properly here as a part of the pre-trial conference in limiting or attempting to limit, in accordance with the procedures laid down by the Prettyman Report adopted by the Judicial Conference of the United States, and in accordance with the well established procedure prior to the Prettyman Report, bringing the Judicial Conference recommendations in this regard within the discretion of the trial Judge to limit the issues or to also limit the proof so that the parties may be prepared for the trial.

58 As I indicated to you the other day, the Prettyman Committee of the Judicial Conference has now been

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combined with the Judicial Conference Committee on Procedure, of which I am a member. A similar Committee of the American Bar Association met here in my Chambers last Saturday. I think I fully understand the extent to which my jurisdiction should go and my discretion should go under the report of the Judicial Conference, and it certainly fully encompasses this matter now before me.

The question here is whether by pre-trial order I should limit the evidence to the period beginning September 16, 1940, which was the date of the decree in the prior case.

Incidentally, I wish to interrupt myself to say that since you brought this matter up the other day I have read the prior decree on the complaint and I also have the advantage of this other splendid index and glossary that the Government has gotten ready and given me now in advance, and I am very indebted to the Government for it. It has been a help to me.

In this case, this is a suit that the Government brings under the Sherman Act and the Clayton Act against ten dairy companies in the Chicago area. Five of the defendants have signed, as we all know, a consent decree. The non-consenting defendants are The Borden Company and its subsidiary, the Belmont Dairy Company; Bowman Dairy Company and its subsidiary, Ridgeview Farms Dairy; and Beloit Dairy Company. The complaint alleges that each of the defendants has conspired to monopolize, and has monopolized interstate commerce in the sale of fluid milk to wholesale customers and public institutions in the Chicago area, in violation of Sections 1 and 2 of the Sherman Act.

The complaint then goes on and further alleges that each of the defendants has sold and is continuing to sell fluid milk in interstate commerce to different whole-
59 sale purchasers at discriminatory prices, in violation of Section 2(a) of the Clayton Act, as amended.

On September 14, 1940, as counsel has previously stated, a similar civil suit, although relating to some extent largely to retail business but nevertheless a similar suit, was filed by the Government in this Court. That suit was also based upon an alleged monopolization of the fluid milk business in the Chicago area by certain dairy companies and other persons. Two of the non-consenting defendants in this case—Borden Co. and Bowman Dairy Company—and three of the consenting defendants—Hunding Dairy Co., Capitol Dairy Company and Western United Dairy Company—were defendants in the 1940 suit. The 1940 suit resulted in the entry of a consent decree on September 16, 1940.

The five non-conforming defendants in this suit contend that the Government should now be barred from introducing evidence of alleged unlawful activities which antedate the entry of the 1940 consent decree. The complaint refers to events which occurred from 1928 to 1940. Counsel for the Government have indicated that their evidence will reach back to 1932, and that very little of it will antedate 1940.

Now, from my review of the previous decree and from listening to your arguments here and from my review of the Government's case insofar as it has been presented in the pre-trial conference, I am of the opinion that the entry of a decree in a major anti-trust suit does, or should, dispose of all of the offenses charged in that complaint. I am also of the opinion that evidence of acts which occurred prior to the decree should not be used in subsequent anti-trust suits brought against the same defendants, even if the subsequent suit is brought for another phase of the business.

That is, wholesale as distinguished from retail, if the
60 essential product or flow of commerce is the same product; namely, fluid milk. These opinions I feel are well grounded upon sound policy. First, the entry of a consent decree in a major industry should represent a final settlement of all differences between industry and the Government, insofar as they are encompassed by the complaint in that case. The decree should afford a certain amount of security to the industry. Second, it seems grossly unfair to me to permit the Government to introduce evidence of violations which might have been introduced in the first suit.

It is true that most of the defendants in the 1940 suit are not now before this Court, as Government counsel has ably pointed out. It is also true that one of the non-consenting defendants was not a party to the 1940 suit. However, I am not now ruling on the matter of res adjudicata or collateral estoppel. Despite a lack of complete identity between the two sets of defendants in the two cases it is important to note that one major segment of the fluid milk industry in Chicago, or some segment, appears in both suits. That segment consists of the Borden Company and the Bowman Company. The instant complaint labels these companies "dominant distributors" and alleges that they and their respective subsidiaries have sold, in one year, sixty per cent of all fluid milk sold to wholesale customers and public institutions in the Chicago area. According to the Government, then, four of the five defendants now

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before the Court control sixty per cent of at least one facet of the milk industry in Chicago. And these defendants were before this Court in the 1940 suit.

It is true that the 1940 suit dealt only with the Sherman Act, whereas the instant suit alleges violations of both the Sherman and Clayton Acts. However, the complaint alleges violations of *Clayton* which began in January, 1941.

It is only when speaking of Acts which would come
61 under the *Sherman* heading that the complaint reaches back before 1940.

While on the subject of the complaint, it is well to note that its drafters must have felt that there was and is some significance to the 1940 date. In Paragraph 26, which alleges a conspiracy to violate the Sherman Act, in that paragraph the Government alleges that the conspiracy began in 1940. In the part of the complaint labeled "offenses," in Paragraphs 36 and 37, the Government alleges that Borden and Bowman acquired certain competing distributors during a period beginning in 1940. It is in an earlier part of the complaint, labeled "position of the Defendants in the Industry" in Paragraphs 23 and 24, that the Government alleges acquisitions by Borden and Bowman during the period from 1928 to 1940.

Under the theory of the complaint itself, therefore, evidence of alleged offenses should relate to the period beginning in 1940.

In choosing the 1940 date, I wish to make clear that I am not following an inflexible rule of law; it is, rather, a rule of convenience. The peculiar facts of this case dictate that choice, in my opinion. And after a careful review of the complaint, I am convinced that the Government will not be unduly restricted by this ruling, for the reason that naturally I do take judicial notice of the 1940 decree.

I also, by taking the 1940 date, which is September 16, 1940, do not in any way preclude the Government from introducing evidence surrounding the transaction late in 1939, by which the defendant, Bowman, acquired the assets of this Ratcliffe, I believe it was, partnership, and then later, early in 1940, took those assets and chartered the Ridgeview Corporation. Also, I do not exclude, by taking this 1940 date, evidence or circumstances surrounding the acquisition by Borden of its subsidiary early in 1940.

62 With those two clarifications, because I think they are peculiarly within this case and not the former case, I do adopt the date of September 16, 1940, the date of the former decree, for the reasons just enumerated as gen-

eral, though not inflexible, cut-off date for evidence in this case.

ENTER:

CAMPBELL
Judge

February 27, 1953

63 * * * * *

64 [FILE ENDORSEMENT OMITTED]

IN

UNITED STATES DISTRICT COURT

[TITLE OMITTED]

Plaintiff's Offer of Proof in Accordance With Rule 43 of Federal Rules of Civil Procedure—filed March 10, 1953

The plaintiff has moved the Court for the privilege of cross examining the witness H. C. Eggleston for the reason that the witness is hostile, and the Court has granted the motion. Notwithstanding, the witness, during his interrogation by plaintiff, has shown and expressed difficulty in remembering facts concerning matters relevant to this cause which he has testified as true on other occasions; that for the purpose of refreshing the memory of the witness H. C. Eggleston and for the further purpose of impeaching said witness, the plaintiff has requested the Court for permission to use the original unsealed deposition of the witness H. C. Eggleston taken by the Dean Milk Company on March 23, 1951 at Chicago, Illinois, at which time counsel for the defendants Bowman Dairy and Borden Dairy were present, in the case of *Dean Milk Co.* v. *American Processing and Sales Co., Inc., et al.,* Case No. 49 C 1159 in the records of this Court, and that the plaintiff, because said deposition is unsigned, will produce S. Anita Mann, who will testify from her notes that she is the reporter who took the deposition down in shorthand and later transcribed it; that the plaintiff will then refresh the witness' memory by showing and reading to him from the aforesaid

65 deposition the following questions and answers which the witness heard and gave during the taking of said deposition, to-wit:

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Q. Was the subject of Dean's attempt to come into the City of Chicago with paper discussed by you with any other representative of any other dairy?

* * * * *

A. I am pretty sure I discussed that [p. 22] with Mr. Koenig and Mr. Baril of the Borden Dairy Company.

* * * * *

Q. And who else?
A. That is all that I can recall right now.
Q. Who is Mr. Baril?
A. Mr. Baril was vice-president of the Borden Company at that time.

Mr. Hart: Spell that name just for the sake of the record.
The Witness: I think Baril is spelled B-a-r-i-l.
Mr. Hart: B-a-r-i-l.
The Witness: That is right.

By Mr. McConnell:

Q. And who is Mr. Koenig?
A. Mr. Koenig was sales manager at that time.
Q. Sales manager of what?
A. Of the Borden Company.
Q. Now, tell us what you recall of your discussion with those gentlemen, or either of them, with reference to Dean Milk Company coming into the City of Chicago to sell milk in paper containers? [p. 23]

* * * * *

The Witness: Well, I think we just discussed what we were going to do if Dean was successful, and we were not lined up with the American Can Company, so we were on the street the same day with paper the same day that the Dean Company came out with it.

66 *By Mr. McConnell:*

Q. And you discussed that with the Borden Company?
A. Yes. [p. 24]

* * * * *

Q. Now, at the time that Dean Milk Company came into Chicago with fluid milk, did you receive any instructions from your board of directors or any of the directors of your company as to what you should do

with reference to the competition of the Dean Milk Company?

* * * * *

A. We got instructions not to lose any business to the Dean Milk Company under any circumstances.

Q. And what were you instructed to do in order to carry out that general order?

A. Do what was ever necessary to hold the account.

Q. And what did that include?

A. Well—

* * * * *

A. That would include offering them fifty dollars, one hundred dollars, giving them a butcher-box or ice-box or anything that was necessary to hold the account. [p. 34]

Q. Now, who were you going to offer this money to?

A. The storekeeper.

Q. Who was buying the milk?

A. Correct.

Q. Under those instructions did you do anything or order anything done by your solicitors who were working under your direction?

* * * * *

Q. Well, we gave division managers instructions not to lose any business to the Dean Milk Company.

* * * * *

Q. Did you make payments to grocery store people?

67 * * * * *

A. We did.

Q. In what way would you make those payments?

A. Why, the division manager would make out a [35] check payable slip for trade expense, and we would O.K. it and send in a check, he would cash it and deliver the cash to the storekeeper.

Q. And then would he give—what evidence would you have that he had actually made that payment?

A. Well, the only evidence was that the man that delivered the cash would get a receipt from the storekeeper that he had received it, that was all.

Q. And what would he do with that receipt, the solicitor who made the payment?

A. As a rule he would keep the receipt in his desk, or sometimes turn it over to the division manager. As a rule he kept it in his desk so the division manager could get it at any time.

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Q. Approximately how much money did your company expend in that manner in those years?

* * * * *

Q. Per year?

A. Well, it is pretty hard to say. I would just have to make a guess roughly. It is—I think at the time I left there it was running maybe 100,000, 150,000 a year. [36]

* * * * *

Q. When was the first time you talked to Meadowmoor?

* * * * *

A. I think it was around 1938 or 1939.

Q. And who did you talk with?

A. Bud Schaub.

Q. Will you tell us what was talked about, what the conversation was?

68 * * * * *

A. Well, I talked to him about the milk situation in general. He told me that they would like to—it was pretty hard for them to control their distributors, but if they raised their prices and if we were going to go out and bother their stores, why, it was going to be pretty hard for them to do it.

* * * * *

Q. What else was said?

A. I gave them the assurance that we wouldn't do anything to bother their stores and he gave me to understand that he would have the distributors lay off from our stores. [42]

* * * * *

Q. Now, you say you weren't doing anything to disturb their stores. You mean by that he wouldn't solicit your accounts?

* * * * *

A. Yes.

Q. You nodded your head?

A. Yes.

* * * * *

Q. Was that subject specifically discussed that you were not to solicit each other's accounts?

A. Yes.

* * * * *

Q. Just tell us what you said on that subject.

A. Mr. Schaub said the distributors there, it was pretty hard to control them, but they would like to

get up their prices; but as soon as they went out and raised their prices, our men would go in and take the account away from them.—

* * * * *

The Witness: —And I assured them we would go [43] along and wouldn't bother any of their accounts.

* * * * *

Q. What assurance did he give to you, if any?

69 * * * * *

A. He said that he would do the same thing; if one of their distributors bothered any of our accounts, to give them a ring. [p. 44]

* * * * *

Q. Was there some discussion of the purpose of buying out that dairy in your company?

* * * * *

A. Yes, we had discussed it.

Q. Who discussed it?

A. Well, I think it was discussed at the entire Board of Directors.

Q. And what was said in the Board of Directors?

A. We organized—

* * * * *

The Witness: —we organized that we would operate the Ridgeview Company, operate the company, and try—operate the company, and use it to fight cut price competition.

* * * * *

Q. In what way were you going to use it against cut price competition?

* * * * *

A. To solicit the other fellow's accounts. If we had to cut the price, we would cut the price of Ridgeview and we wouldn't be dropping the price of the Bowman Dairy milk. [45]

* * * * *

Q. Did you use it in that manner?

A. We did.

* * * * *

Q. Against what company?

A. We used it against a great many companies. We used it against Hawthorn-Mellody Farms; we used it against Kramel.

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* * * * *

70 Q. What method, how would they do that? Just tell us how you did it.

* * * * *

A. Well, if these fellows would go out and bother many of our accounts, we would put men behind in trucks and follow them, get the names and addresses of the accounts and go in and offer whatever was necessary to get the account or make them cut their price to meet it.

* * * * *

Q. Was that dairy, that Ridgeview Dairy, rated [46] by you at a profit or a loss?

A. Not while I was there.

* * * * *

Q. It was not operated at a profit while you were there?

A. No.

* * * * *

Q. Who, if anybody, absorbed the loss of that company?

* * * * *

A. The Bowman Dairy.

Q. Did you have any talk with anybody from any other dairy company about your Ridgeview dairy?

* * * * *

A. Yes, we did. Mr. Philippi and I discussed it with the Borden people.

Q. Who at the Borden people? [p. 47]

* * * * *

Q. Who did you discuss it with at the Borden Company?

* * * * *

A. Mr. Baril and Mr. Smaha.

Q. You have told us about Mr. Baril. Who was Mr. Smaha?

A. Mr. Smaha was executive vice president, I believe, at that time.

* * * * *

71 Q. When did you have a talk with them?

A. About the time we started out with the Ridgeview Dairy.

Q. And that was about when?

A. 1938 or 1939.

Q. Do you recall where you had the talk with them?
A. At the Lake Shore Club.
Q. The Lake Shore Club. Now, what was that conversation?

* * * * *

A. We told them about Ridgeview and [48] what we were going to use it for, and—
Q. Just tell us what you told them.
A. We told them that we had bought out the Radcliffe Dairy and we had changed the name to Ridgeview. We were going to just use it to fight the cut price competition and we were not going to use it against them, and they said that they were considering something along the same line themselves; and shortly after that they organized the Belmont Dairy.

* * * * *

Q. All right. Shortly after that conversation did they organize the dairy, too?
A. They did.

* * * * *

Q. What was the name of that dairy?
A. Belmont Dairy. [p. 49]
Q. Did you have any further discussion with anybody from the Borden Company with reference to the operation of the Belmont Dairy?
A. Oh, once in a while, why, Belmont might bother one of our accounts and I would give either Mr. Koenig or Mr. Baril a call and tell them about it and it would be adjusted. [p. 51]

* * * * *

72 Q. Did you ever at any time have any understanding with Borden that their Belmont Dairy would not be used against your company?

* * * * *

A. Yes, we had a general understanding that we wouldn't use the Ridgeview against their accounts and they wouldn't use Belmont against ours. [52]

* * * * *

Q. Did you have some difficulties with the Capitol Dairy along about 1932 or 1933?

* * * * *

A. Well, we got into a quarrel over some stores and we were out after their stores and [52] were offering

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them $50, $100, or $150, whatever we could do, to get their accounts; and I got a call from Mr. Fried and he said he would like to see me; and he and Mr. Shankman came over to see us and we adjusted the differences there. We were out after his stores and we were offering his stores $100 and $50; and if we didn't get them the Capitol Dairy would have to meet them in order to hold the account.

* * * * *

A. And Mr. Shankman and Mr. Fried talked to me about it and they stated that they were just a small company and they couldn't afford to go out and pay $100 and $150 for stores, . . . [53]

* * * * *

(Answer read)

The Witness: And Mr. Fried and Shankman came over and talked to me about it, and so I gave him the assurance that we wouldn't do anything to bother any more of their accounts and they didn't bother ours. [54]

* * * * *

73 Q. You called Mr. Corrigan. Go ahead.

A. I called Mr. Corrigan and talked to him about it and at several stores he had taken away from us, and he said, well, he would check into it; and there was nothing down [done] about it. So we turned Ridgeview loose on their stores.

We had men follow behind their trucks and get the names and addresses of their stores and we turned them over to Ridgeview and they sent solicitors [58] in there; and we sold milk as low as five cent a quart off the Ridgeview trucks and—

Q. Then what happened?

A. And Hawthorn was forced to meet that price on a number of accounts.

* * * * *

Q. Did you get a call from anybody?

A. I got a call from Mark Lipsky who was sales manager at that time.

Q. Who was sales manager of what company?

A. Of Hawthorn-Mellody at that time.

Q. What did he tell you?

A. He said that he and Mr. Peters would like to see me and I agreed to meet them at the Lake Shore

Club. We went over the entire situation and we made an agreement at that time that we would not bother any more of their accounts and they wouldn't bother any more of ours. We would call everything status quo.

* * * * *

Q. You say you made an agreement. What was said there between the parties in that conversation? [59]

A. Well, there was a lot of things said. They accused us of starting it and we accused them of starting it. We were up on them about forty some stores at that time.

Q. All right. Now what was said about the agreement, about not taking one another's accounts?

74 * * * * *

A. We agreed effective as of the following morning that we would not take any more of their accounts or they wouldn't take any more of our accounts. [60]

* * * * *

Q. Along in 1940 did A & P give Borden some additional accounts?

A. Along in 1940 we commenced to lose some of our accounts; wherever a store would move across the street that we were serving they would give it to Borden. I would go in and talk to them about it: "Well, what can you do for us; what can you do for us?" And along about that time, the Capitol Dairy was notifying to discontinue all of the A & P stores they were serving on the southside; and, shortly after that, the Union Dairy got notified to discontinue servicing all the A & P stores that they had on the westside. I talked to Baril about it, I talked to Koenig about it. Mr. Philippi was present at some of these meetings, and it was the same old story, that if anything is done, it is done in New York and they don't know anything about it.

* * * * *

Q. Did you receive, at some subsequent time, any notice?

A. Along about 1942, in the spring of the year, I was away on a fishing trip, and when I came back, got in town on Friday night, I got a call from Mr. Larson. He said they had been notified to discontinue servicing all the A & P stores a week from Monday. I knew it would be impossible for me to see the A & P people

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on Saturday morning, and I went into our head office and discussed it with some of the directors who were present. I told them I was pretty sure that [67] the order didn't come from Chicago, that it was from higher up, that this order came from New York, and
75 I said that I would go over and talk to the A & P people here in Chicago, and if I couldn't get any satisfaction there I would like to go down to New York and talk to the A & P people in New York. I went in and talked to Mr. Hoadley who was president of the western division. [68]

* * * * *

76 A. * * * And we gave them 11 percent discount. He wanted to know what we were going to do in lieu of the back discount. He said that they had gone along with us on the five percent when they were doing a whole lot better elsewhere, and we agreed to give them $50,000 in lieu of the back discount. And I said, "Mr. Buffinger, I want you to understand this. This proposition we are making to you is just for our own accounts, and we want our share of new stores that open up." He said, "Well, you go back to Chicago and you call me at 2:00 o'clock on Thursday." I called him at 2:00 o'clock. He said, "All right, Eggleston, you go in and see Mr. Hoadley and make [p. 70] the final arrangements with him." He said, "We will see that you keep your accounts and get your share of the new stores that open." I went over and talked to Mr. Hoadley and told him that we would deliver the checks in a few days, which I did.

* * * * *

Q. Did you make that 11 percent discount available to any of your other accounts?

A. No.

* * * * *

Q. Did you ever have any talks with anybody from the Borden Company with reference to the prices that you would bid for the sale of milk to the Great Lakes? [p. 75]

* * * * *

A. Yes, we had a general understanding with the Borden Company that they would take Great Lakes and Fort Sheridan one quarter and we would take it the other quarter.

* * * * *

Q. Whom did you make that understanding with? Whom did you talk to about it at the Borden Company?

* * * * *

A. I have talked to Mr. Baril about it, and I talked to Mr. Koenig about it. And a little later he suggested we give it to one of our subordinates and let them handle it, and I turned it over to Mr. Buthman and Borden turned it over to a man by the name of Roden-
77 bach, and there was another man, and they would meet and give one another the prices that they were going to bid when it was their quarter to take the business. [p. 76]

* * * * *

Q. What did you talk to Mr. Baril and Mr.—who was the other gentleman?

A. Koenig.

Q. Mr. Koenig about?

* * * * *

Q. What did you say, in substance, back and forth?

* * * * *

A. I would call them and tell them I would like to see them, and I said, "It is your turn to take Fort Sheridan. What are you going to bid, or what are you going to bid on Great Lakes?" He would give me their prices, and if it was their turn to take it, we would bid over it. If it was our turn, they would bid over our prices.

* * * * *

Q. And you discussed that in your conversation, what you would bid, is that right?

A. Absolutely. [p. 77]

* * * * *

Q. Did you have any talks with Ollie Smaha about prices you were going to bid on the penny lunches in the schools?

* * * * *

A. Mr. Philippi and I, we would meet Mr. Baril and Mr. Smaha and decide on what prices we would bid on the penny lunches.

* * * * *

Q. What did you talk about?

A. Well, when it was time to put in the bids at the schools, it generally went in along in the fall of the

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78 year, and the bids went from January 1st to January 1st, for the full year. [p. 78]

* * * * *

A. And we would agree to just bid on the schools we wanted; Borden would agree to bid on the schools they wanted. We wouldn't bid on Borden's schools or they wouldn't bid on ours.

* * * * *

Q. And that was the substance of your conversation?

A. Yes, sir.

Q. Going back to Mr. Dean and the Dean milk problem for the moment, did you have any understanding with the other dairies or anybody representing the other dairies as to what the different companies would do with reference to soliciting or obtaining accounts which were being served by the Dean Milk Company?

* * * * *

A. I don't think I ever discussed the Dean Milk Company with anybody outside of the Borden Company and probably Hawthorn Mellody.

Q. What did you discuss with those two companies? [p. 79]

* * * * *

Q. And with whom?

A. I discussed it with Mr. Corrigan from the Hawthorn Mellody. Then I discussed it with Mr. Koenig and Mr. Baril of the Borden Company.

Q. What was the nature of your—let us take up the discussion—

* * * * *

Q. The Borden Company, first. What did you discuss with them about Dean's at the time?

* * * * *

A. We discussed about Dean offering a five percent discount to all of their stores, and we took the position that we weren't going to lose any account to Dean
79 regardless of what we had to do to hold them, and the Borden Company felt the same way. [p. 80]

Q. Let us get our conversations identified a little better here now. Whom did you talk to at Borden's, from Borden's?

A. Mr. Baril and Mr. Koenig.

Q. All right, now when did you first, as nearly as you can place the date, and the place, where did you talk to Mr. Baril and Mr. Koenig about Dean?

* * * * *

A. Well, I met Mr. Koenig and Mr. Baril at the Plaza Hotel. Sometimes I would give them a ring, and Mr. Baril suggested that I drive down a side street near their plant and wait for them in their car, and he would come walking along and get in my car and we would discuss it. Sometimes we discussed it at the Lake Shore Club. [p. 81]

* * * * *

Q. Now you say you talked to somebody from Hawthorn Mellody about that question. Who was that?

* * * * *

A. Mr. Corrigan. [p. 82]
Q. Where was that talk?

* * * * *

A. I talked to Mr. Corrigan at the Moraine Hotel in Highland Park at one time, and I met him at the Lake Shore Club a couple of times and had lunch with him.
Q. What did you discuss? What did you say?
A. I asked Mr. Corrigan what they were doing to combat this five percent that Dean was offering to all of the stores on any new accounts that they got, and he assured me that they weren't losing any accounts, that they were going to hold them regardless of what they had to do.

* * * * *

80 A. Some of them were giving five percent and some we met the five percent, and others we gave them a cash donation. [p. 83]

* * * * *

That if, after hearing said questions and answers read, the witness H. C. Eggleston denies having made them, the Government will claim the witness' oral testimony given in this cause wherever contrary to the testimony in said deposition, has been and is impeached.

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81 * * * * *

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82 [FILE ENDORSEMENT OMITTED]

IN

UNITED STATES DISTRICT COURT

[TITLE OMITTED]

Offer of Proof—filed March 12, 1953

If the witness Hans Moser were permitted to testify concerning his conversation with W. A. Baril, sales manager of The Borden Company, now deceased, witness would testify as follows:

That in July 1943, shortly after receiving the award for the sale of fluid milk for the third quarter of 1943 to the Navy Pier, Chicago, Illinois, he was telephoned by W. A. Baril, who the witness knew was sales manager for The Borden Company of Chicago, and who stated that he would meet witness for lunch at Black's Restaurant. Witness later that day picked up Baril in witness' automobile and a conversation was held in which Baril said to witness that the Navy Pier was Borden's business and asked why witness had bid on it. Witness answered that it was necessary for him to show some Government business in order to get a priority on machinery which he needed for further operation in his dairy. Baril answered that because Borden had lost the Navy Pier business, they would have to offset that business with something else and that he was going out and get witness' store accounts. Witness answered that he would not bid again on the Navy Pier and he did not lose any of his store accounts to The Borden Company.

Witness would further testify that he has never again bid on the Navy Pier.

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83 * * * * *

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84 [FILE ENDORSEMENT OMITTED]

IN

UNITED STATES DISTRICT COURT

[TITLE OMITTED]

Motion of the Borden Company at the Close of Plaintiff's Case to Dismiss the Complaint as to It— filed March 24, 1953

I

Defendant The Borden Company, by its attorneys, Sidley, Austin, Burgess & Smith, moves the Court at the close of plaintiff's case to enter judgment dismissing the complaint as to The Borden Company, on the following grounds:

1. That plaintiff has failed to establish by a preponderance of the evidence that the acts complained of in this case were performed in the course of interstate commerce, or constituted, or threaten to constitute, a burden on such commerce;

2. That plaintiff has failed to establish by a preponderance of the evidence that defendant The Borden Company has violated either Section 1 or 2 of the Sherman Act or Section 2(a) of the Clayton Act as amended.

II

Said defendant further moves the Court to enter judgment dismissing the claim against The Borden Company that it be adjudged and decreed to have engaged in a combination and conspiracy in violation of Section 1 of
85 the Sherman Act, and that it be enjoined from carrying out such combination and conspiracy, on the ground that plaintiff has failed to establish by a preponderance of the evidence that said defendant has engaged, or threatens to carry out, such combination and conspiracy.

III

Said defendant further moves the Court to enter judgment dismissing the claim against the Borden Company that it be adjudged and decreed to be a monopoly in violation of Section 2 of the Sherman Act, either alone or in combination with others, on the ground that plaintiff has failed to establish by a preponderance of the evidence that it is entitled to this relief.

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IV

Said defendant further moves the Court to enter judgment dismissing the claim against the Borden Company that it be adjudged and decreed to have made discriminations in price to certain of its wholesale customers in violation of Section 2a of the Clayton Act, and that it be enjoined from making such discriminations in the future, on the following grounds:

1. That plaintiff has failed to establish by a preponderance of the evidence that defendant the Borden Company has made any such discriminations in price;

2. That plaintiff has failed to establish by a preponderance of the evidence that Borden sales to its wholesale customers occur in the course of interstate commerce;

3. That plaintiff has failed to establish by a preponderance of the evidence that the effect of any such sales, or the prices charged in such sales, may be substantially to lessen competition or tend to create a
86 monopoly in any line of commerce or to injure, destroy, or prevent competition with defendant Borden or with any of its wholesale customers;

4. That plaintiff has failed to establish by a preponderance of the evidence that defendant Borden threatens to grant any discrimination in price in violation of Section 2a of the Clayton Act.

V

Said defendant further moves the Court to enter judgment dismissing the claim against the Borden Company that it be enjoined from acquiring the stock or assets of any competing distributors, on the ground that plaintiff has failed to establish by a preponderance of the evidence that said defendant has acquired or threatens to acquire such competing distributors in violation of any law.

VI

Said defendant further moves the Court to enter judgment dismissing the claim against the Borden Company that it be required to dispose of its interests in Belmont Dairy Company, on the ground that plaintiff has failed to establish by a preponderance of the evidence that said defendant acquired or used, or threatens to use, the Belmont Dairy Company in violation of any law.

VII

Said defendant further moves the Court to enter judgment dismissing the claim against the Borden Company that it be required to dispose of plants, facilities, and other assets used by the Chicago Milk Division of said defendant, on the ground that plaintiff has failed to establish by a preponderance of the evidence that it is entitled to such relief.

87

VIII

Said defendant further moves the Court to enter judgment dismissing the claim against the Borden Company that it be enjoined from maintaining store retail prices suggested by it, on the ground that plaintiff has failed to establish by a preponderance of the evidence that said defendant has maintained, or threatens to maintain, such retail prices.

IX

Said defendant further moves the Court to enter judgment dismissing the claim against the Borden Company that it be enjoined from allocating with others the business of selling fluid milk to public institutions owned or operated by the plaintiff, on the ground that plaintiff has failed to establish by a preponderance of the evidence that said defendant has allocated, or threatens to allocate, such business with others, by any means whatsoever.

X

Said defendant further moves the Court to enter judgment dismissing the claim against the Borden Company that it be enjoined from allocating with others the business of selling fluid milk to public institutions owned or operated by governments other than the plaintiff, on the ground that plaintiff has failed to establish by a preponderance of the evidence that said defendant has allocated, or threatens to allocate, such business with others, by any means whatsoever.

XI

Said defendant further moves the Court to enter judgment dismissing the claim against the Borden Company that it be enjoined from offering inducements to wholesale customers of non-defendants, on the ground that plaintiff has failed to establish by a preponderance of the evi-

88 dence that said defendant has offered or threatens to offer, inducements to wholesale customers of non-

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defendants, pursuant to any conspiracy or any other unlawful plan.

XII

Said defendant further moves the Court to enter judgment dismissing the claim against the Borden Company that it be enjoined from offering interest-free loans to wholesale customers of non-defendants, on the following grounds:

1. That plaintiff has failed to establish by a preponderance of the evidence that said defendant threatens to offer interest-free loans to wholesale customers of non-defendants;

2. That plaintiff has failed to establish by a preponderance of the evidence that said defendant threatens to offer such interest-free loans in violation of any law.

XIII

Said defendant further moves the Court to enter judgment dismissing the claim against the Borden Company that it be enjoined from refraining from competing for the fluid milk business of the wholesale customers of another defendant, on the ground that plaintiff has failed to establish by a preponderance of the evidence that said defendant threatens to refrain from competing for such business.

STUART S. BALL
Stuart S. Ball

H. BLAIR WHITE
H. Blair White

JOSEPH E. GREAVES
Joseph E. Greaves

Attorneys for defendant,
The Borden Company

Sidley, Austin, Burgess & Smith
of counsel

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90 [FILE ENDORSEMENT OMITTED]

IN

UNITED STATES DISTRICT COURT

[TITLE OMITTED]

Motion of the Belmont Dairy Company at the Close of Plaintiff's Case to Dismiss the Complaint as to It—filed March 24, 1953

I

Defendant Belmont Dairy Company, by its attorneys, Sidley, Austin, Burgess & Smith, moves the Court at the close of plaintiff's case to enter judgment dismissing the complaint as to the Belmont Dairy Company, on the following grounds:

1. That plaintiff has failed to establish by a preponderance of the evidence that the acts complained of in this case were performed in the course of interstate commerce, or constituted, or threaten to constitute, a burden on such commerce;

2. That plaintiff has failed to establish by a preponderance of the evidence that defendant the Belmont Dairy Company has violated either Section 1 or 2 of the Sherman Act or Section 2(a) of the Clayton Act as amended.

II

Said defendant further moves the Court to enter judgment dismissing the claim against the Belmont Dairy Company that it be adjudged and decreed to have engaged in a combination and conspiracy in violation of Section
91 1 of the Sherman Act, and that it be enjoined from carrying out such combination and conspiracy, on the ground that plaintiff has failed to establish by a preponderance of the evidence that said defendant has engaged, or threatens to carry out, such combination and conspiracy.

III

Said defendant further moves the Court to enter judgment dismissing the claim against the Belmont Dairy Company that it be adjudged and decreed to be a monopoly in violation of Section 2 of the Sherman Act, either alone or in combination with others, on the ground that plaintiff has

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failed to establish by a preponderance of the evidence that it is entitled to this relief.

IV

Said defendant further moves the Court to enter judgment dismissing the claim against the Belmont Dairy Company that it be adjudged and decreed to have made discriminations in price to certain of its wholesale customers in violation of Section 2a of the Clayton Act, and that it be enjoined from making such discriminations in the future, on the following grounds:

1. That plaintiff has failed to establish by a preponderance of the evidence that defendant the Belmont Dairy Company has made any such discriminations in price;

2. That plaintiff has failed to establish by a preponderance of the evidence that Belmont Dairy Company sales to its wholesale customers occur in the course of interstate commerce;

3. That plaintiff has failed to establish by a preponderance of the evidence that the effect of any such sales, or the prices charged in such sales, may be substantially to lessen competition or tend to create a
92 monopoly in any line of commerce or to injure, destroy, or prevent competition with defendant Belmont Dairy Company or with any of its wholesale customers;

4. That plaintiff has failed to establish by a preponderance of the evidence that defendant Belmont Dairy Company threatens to grant any discrimination in price in violation of Section 2a of the Clayton Act.

V

Said defendant further moves the Court to enter judgment dismissing the claim against the Belmont Dairy Company that it be enjoined from acquiring the stock or assets of any competing distributors, on the ground that plaintiff has failed to establish by a preponderance of the evidence that said defendant has acquired or threatens to acquire such competing distributors in violation of any law.

VI

Said defendant further moves the Court to enter judgment dismissing the claim against the Borden Company that it be required to dispose of its interest in Belmont

Dairy Company, on the ground that plaintiff has failed to establish by a preponderance of the evidence that said defendant acquired or used, or threatens to use, the Belmont Dairy Company in violation of any law.

VII

Said defendant further moves the Court to enter judgment dismissing the claim against the Belmont Dairy Company that it be enjoined from maintaining store retail prices suggested by it, on the ground that plaintiff has failed to establish by a preponderance of the evidence that said defendant has maintained, or threatens to maintain, such retail prices.

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VIII

Said defendant further moves the Court to enter judgment dismissing the claim against the Belmont Dairy Company that it be enjoined from allocating with others the business of selling fluid milk to public institutions owned or operated by the plaintiff, on the ground that plaintiff has failed to establish by a preponderance of the evidence that said defendant has allocated, or threatens to allocate, such business with others, by any means whatsoever.

IX

Said defendant further moves the Court to enter judgment dismissing the claim against the Belmont Dairy Company that it be enjoined from allocating with others the business of selling fluid milk to public institutions owned or operated by governments other than the plaintiff, on the ground that plaintiff has failed to establish by a preponderance of the evidence that said defendant has allocated, or threatens to allocate, such business with others, by any means whatsoever.

X

Said defendant further moves the Court to enter judgment dismissing the claim against the Belmont Dairy Company that it be enjoined from offering inducements to wholesale customers of non-defendants, on the ground that plaintiff has failed to establish by a preponderance of the evidence that said defendant has offered or threatens to offer, inducements to wholesale customers of non-defendants, pursuant to any conspiracy or any other unlawful plan.

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XI

Said defendant further moves the Court to enter judgment dismissing the claim against the Belmont Dairy
94 Company that it be enjoined from offering interest-free loans to wholesale customers of non-defendants, on the following grounds:

1. That plaintiff has failed to establish by a preponderance of the evidence that said defendant threatens to offer interest-free loans to wholesale customers of non-defendants;

2. That plaintiff has failed to establish by a preponderance of the evidence that said defendant threatens to offer such interest-free loans in violation of any law.

XII

Said defendant further moves the Court to enter judgment dismissing the claim against the Belmont Dairy Company that it be enjoined from refraining from competing for the fluid milk business of the wholesale customers of another defendant, on the ground that plaintiff has failed to establish by a preponderance of the evidence that said defendant threatens to refrain from competing for such business.

STUART S. BALL
Stuart S. Ball

H. BLAIR WHITE
H. Blair White

JOSEPH E. GREAVES
Joseph E. Greaves

Attorneys for defendant,
Belmont Dairy Company

Sidley, Austin, Burgess & Smith
of counsel

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95 * * * * *

96 [FILE ENDORSEMENT OMITTED]

IN

UNITED STATES DISTRICT COURT

[TITLE OMITTED]

Motion to Dismiss—filed March 24, 1953

Now comes the defendant, BOWMAN DAIRY COMPANY, at the close of the plaintiff's evidence, and moves to dismiss the above entitled cause.

L. EDWARD HART, JR.
L. Edward Hart, Jr.

ERNEST J. LONDON
Ernest J. London

Dated: March 24, 1953.

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97 [FILE ENDORSEMENT OMITTED]

IN

UNITED STATES DISTRICT COURT

[TITLE OMITTED]

Motion of Bowman Dairy Company to Dismiss Complaint—filed March 24, 1953

Now comes the defendant, BOWMAN DAIRY COMPANY, at the close of the plaintiff's evidence, and moves that the complaint filed in the above entitled cause be dismissed.

L. EDWARD HART, JR.
L. Edward Hart, Jr.

ERNEST J. LONDON
Ernest J. London

Attorneys for
Bowman Dairy Company

Dated: March 24, 1953.

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98 • • • • •

99 [FILE ENDORSEMENT OMITTED]

IN

UNITED STATES DISTRICT COURT

[TITLE OMITTED]

Motion to Dismiss Count I—filed March 24, 1953

Now comes the Defendant, BOWMAN DAIRY COMPANY, at the close of the plaintiff's evidence, and moves to dismiss Count I of the complaint filed in the above entitled cause.

L. EDWARD HART, JR.
L. Edward Hart, Jr.

ERNEST J. LONDON
Ernest J. London

Dated: March 24, 1953.

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100 [FILE ENDORSEMENT OMITTED]

IN

UNITED STATES DISTRICT COURT

[TITLE OMITTED]

Motion to Dismiss Count II—filed March 24, 1953

Now comes the defendant, BOWMAN DAIRY COMPANY, at the close of the plaintiff's evidence, and moves to dismiss Count II of the complaint filed in the above entitled cause.

L. EDWARD HART, JR.
L. Edward Hart, Jr.

ERNEST J. LONDON
Ernest J. London

Dated: March 24, 1953.

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101 • • • • •

102 [FILE ENDORSEMENT OMITTED]

IN

UNITED STATES DISTRICT COURT

[TITLE OMITTED]

Motion of Bowman Dairy Company to Dismiss Part of Complaint Alleging Violation of Section 1 of the Sherman Act—filed March 24, 1953

Now comes the defendant, BOWMAN DAIRY COMPANY, at the close of plaintiff's evidence, and moves to dismiss so much of the complaint in the above entitled cause as charges a violation of Section 1 of the Sherman Act.

L. EDWARD HART, JR.
L. Edward Hart, Jr.

ERNEST J. LONDON
Ernest J. London

Attorneys for Bowman Dairy Company

Dated: March 24, 1953.

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103 [FILE ENDORSEMENT OMITTED]

IN

UNITED STATES DISTRICT COURT

[TITLE OMITTED]

Motion of Bowman Dairy Company to Dismiss Part of Complaint Alleging Violation of Section 2 of the Sherman Act—filed March 24, 1953

Now comes the defendant, BOWMAN DAIRY COMPANY, at the close of plaintiff's evidence, and moves to dismiss so much of the complaint in the above entitled cause as charges a violation of Section 2 of the Sherman Act.

L. EDWARD HART, JR.
L. Edward Hart, Jr.

ERNEST J. LONDON
Ernest J. London

Attorneys for Bowman Dairy Company

Dated: Mach 24, 1953.

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104 • • • • •

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105 [FILE ENDORSEMENT OMITTED]

IN

UNITED STATES DISTRICT COURT

[TITLE OMITTED]

Motion of Bowman Dairy Company to Dismiss Part of Complaint Alleging Violation of Section 2(a) of the Clayton Act—filed March 24, 1953

Now comes the defendant, BOWMAN DAIRY COMPANY, at the close of plaintiff's evidence, and moves to dismiss so much of the complaint in the above entitled cause as charges a violation of Section 2(a) of the Clayton Act.

L. EDWARD HART, JR.
L. Edward Hart, Jr.

ERNEST J. LONDON
Ernest J. London

Attorneys for Bowman Dairy Company

Dated: March 24, 1953.

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107 [FILE ENDORSEMENT OMITTED]

IN

UNITED STATES DISTRICT COURT

[TITLE OMITTED]

Motion of Ridgeview Farms Dairy, Inc. to Dismiss—filed March 24, 1953

Now comes the defendant, RIDGEVIEW FARMS DAIRY, INC., at the close of the plaintiff's evidence, and moves that the complaint filed in the above entitled cause be dismissed.

L. EDWARD HART, JR.
L. Edward Hart, Jr.

ERNEST J. LONDON
Ernest J. London

Attorneys for Ridgeview Farms Dairy, Inc.

Dated: March 24, 1953.

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109 [FILE ENDORSEMENT OMITTED]

IN

UNITED STATES DISTRICT COURT

[TITLE OMITTED]

Motion of Ridgeview Farms Dairy, Inc. to Dismiss Part of Complaint Alleging Violation of Section 1 of the Sherman Act—filed March 24, 1953

Now comes the defendant, RIDGEVIEW FARMS DAIRY, INC., at the close of plaintiff's evidence, and moves to dismiss so much of the complaint in the above entitled cause as charges a violation of Section 1 of the Sherman Act.

L. EDWARD HART, JR.
L. Edward Hart, Jr.

ERNEST J. LONDON
Ernest J. London

Attorneys for Ridgeview Farms Dairy, Inc.

Dated: March 24, 1953

110 [FILE ENDORSEMENT OMITTED]

IN

UNITED STATES DISTRICT COURT

[TITLE OMITTED]

Motion of Ridgeview Farms Dairy, Inc. to Dismiss Part of Complaint Alleging Violation of Section 2 of the Sherman Act—filed March 24, 1953

Now comes the defendant, RIDGEVIEW FARMS DAIRY, INC., at the close of plaintiff's evidence, and moves to dismiss so much of the complaint in the above entitled cause as charges a violation of Section 2 of the Sherman Act.

L. EDWARD HART, JR.
L. Edward Hart, Jr.

ERNEST J. LONDON
Ernest J. London

Attorneys for Ridgeview Farms Dairy, Inc.

Dated: March 24, 1953.

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111 * * * * *

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112 [FILE ENDORSEMENT OMITTED]

IN

UNITED STATES DISTRICT COURT

[TITLE OMITTED]

Motion of Ridgeview Farms Dairy, Inc. to Dismiss Part of Complaint Alleging Violation of Section 2(a) of the Clayton Act—filed March 24, 1953

Now comes the defendant, RIDGEVIEW FARMS DAIRY, INC., at the close of the plaintiff's evidence, and moves to dismiss so much of the complaint in the above entitled cause as charges a violation of Section 2(a) of the Clayton Act.

L. EDWARD HART, JR.
L. Edward Hart, Jr.

ERNEST J. LONDON
Ernest J. London

Attorneys for Ridgeview Farms Dairy, Inc.

Dated: March 24, 1953.

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115 IN THE

UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF ILLINOIS

EASTERN DIVISION

No. 51 C 947

UNITED STATES OF AMERICA,

Plaintiff,

— VS. —

THE BORDEN COMPANY, *et al.*,

Defendants.

Memorandum and Order—filed March 30, 1953

1. The Government charges that each of ten defendant dairy companies has been engaged in a conspiracy to restrain and to monopolize, and has monopolized interstate trade and commerce in the sale of fluid milk to wholesale customers and certain public institutions in the Chicago area, in violation of Sections 1 and 2 of the Sherman Act, 15 U.S.C.A., Secs. 1 and 2. The Government also charges that each of ten defendant dairy companies has sold fluid milk in interstate trade and commerce to different wholesale purchasers in the Chicago area at prices which discriminate between said purchasers of fluid milk of like grade and quality, and that the effect of such alleged
116 discrimination may have been and may continue to be substantially to lessen competition or tend to create a monopoly in the sale of fluid milk to wholesale purchasers in the Chicago area, or to injure, destroy or prevent competition between the aforesaid wholesale purchasers knowingly receiving the benefit of such price discriminations and other wholesale customers not receiving the benefit of such discriminations, in violation of Section 2(a) of the Clayton Act, as amended, 15 U.S.C.A., Sec. 13(a).

Paragraph 27 of the complaint defines the alleged conspiracy to monopolize in the following manner:

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"The aforesaid combination and conspiracy has consisted of a continuing understanding and concert of action among the defendants, the substantial terms of which have been:

"(a) That each defendant refrain from competing for the fluid milk business of the wholesale customers of another defendant;

"(b) That each defendant offer inducements such as discriminatory prices, rebates, discounts, lump sum cash payments, interest-free loans, or the furnishing of store equipment or other gratuities to wholesale customers of non-defendant distributors of
117 fluid milk to cause said customers to discontinue their purchases of fluid milk from said non-defendant distributors and to purchase fluid milk from the defendant offering such inducement;

"(c) That each defendant induce its store wholesale customers to agree to maintain the retail prices 'suggested' by the defendants;

"(d) That the defendants Bowman and Borden maintain and enhance their dominant market position by acquiring the businesses, including customer outlets, of competing distributors;

"(e) That defendants Bowman and Borden organize and operate 'fighting companies' in order to suppress and destroy the competition of non-defendant distributors;

"(f) That the defendants collusively allocate and share among themselves the business of selling fluid milk to public institutions;

"(g) That the defendants agree upon, fix, and maintain prices for the sale of fluid milk to public institutions by submitting prearranged, bogus, and collusive bids for the sale of fluid milk to such institutions."

Paragraphs 28 through 45 of the complaint contain
118 detailed descriptions of some of the general charges outlined in paragraph 27; these more descriptive paragraphs will be referred to wherever necessary in the course of this memorandum.

In its prayer for relief, the government asks that the alleged conspiracy to monopolize interstate commerce in

the sale of fluid milk, as described above, be decreed to be in violation of Sections 1 and 2 of the Sherman Act; that the defendants be decreed to have monopolized interstate commerce in the sale of fluid milk, as described above, in violation of Section 2 of the Sherman Act; that the discriminations in price for fluid milk of like grade and quality, which each of the defendants has allegedly granted to certain of its wholesale customers and not to other of its wholesale customers, be decreed to be in violation of Section 2(a) of the Clayton Act, as amended; that the defendants, individually and collectively, be perpetually enjoined from continuing the alleged discriminations and from carrying out the alleged conspiracy to monopolize and the alleged monopolization of commerce in the sale of fluid milk, as described above; that the defendant Borden Company be required to dispose of its entire interest in defendant Belmont Dairy Company to parties who
119 are not named as defendants; that the defendant Borden Company be required to submit a plan for the divestiture of such of its plants, facilities and other assets, used by its Chicago Milk Division, as is necessary to restore effective competition in the distrbution and sale of fluid milk to wholesale customers and public institutions in the Chicago area; that the defendant Bowman Dairy Company be required to dispose of its entire interest in defendant Ridgeview Farms Dairy to parties who are not named as defendants; that defendant Bowman Dairy Company be required to submit a plan for the divestiture of such of its plants, facilities and other assets used by it, as is necessary to restore effective competition in the distribution and sale of fluid milk to wholesale customers and public institutions in the Chicago area; that the agreements, understandings, arrangements and practices of the defendants, alleged in the complaint, be ordered terminated and cancelled. The government has asked for certain other injunctive relief, particularly with reference to certain alleged violations of Section 2(a) of the Clayton Act. I shall describe and comment upon these particular requests for relief in another part of this memorandum.

An extended pre-trial conference was held. At the
120 outset of the conference, counsel apprised the court that five of the ten defendants were conducting negotiations with the government, and that it was likely that agreement would be reached on a consent decree. These negotiations did result in the entry of a consent decree, and consequently, five defendants—American Processing

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and Sales Company, Capitol Dairy Company, Hunding Dairy Company, Meadowmoor Dairies, and Western United Dairy Company—did not appear at or participate in the trial. Counsel are now reminded of my comments on this decree, appearing of record at the time of its entry.

Five nonconsenting defendants—the Borden Company and its subsidiary, Belmont Dairy Company, Bowman Dairy Company and its subsidiary, Ridgeview Farms Dairy, Inc., and Beloit Dairy Company—remained as participants in the pre-trial conference, and appeared as defendants at the trial. For the purposes of this memorandum, the court is concerned solely with those five defendants.

A lengthy pre-trial order emerged from the conference. That order contains numerous agreements of fact, agreements on the manner in which certain evidence would be used at the trial, and agreements as to the issues
121 of the case. At this time, I wish to thank all counsel for the able and workmanlike manner in which they participated in the conference and prepared the pre-trial order. I shall refer to specific provisions of the order in the course of this memorandum.

The government has presented its evidence, and the matter is now before the court on the motion of each defendant to dismiss the complaint, or parts thereof,

The first disputed matter which I must resolve entails a construction of Federal Rule 41(b), which provides:

> "After the plaintiff has completed the presentation of his evidence, the defendant, without waiving his right to offer evidence in the event the motion is not granted, may move for a dismissal on the ground that upon the facts and the law the plaintiff has shown no right to relief. In an action tried by the court without a jury the court as trier of the facts may then determine them and render judgment against the plaintiff, or may decline to render any judgment until the close of all the evidence. If the court renders judgment on the merits against the plaintiff, the court
> 122 shall make findings as provided in Rule 52(a). Unless the Court in its order for dismissal otherwise specifies, a dismissal under this subdivision . . . operates as an adjudication upon the merits."

Plaintiff contends that this court, in considering the instant motions, is precluded from weighing the evidence. Plaintiff vigorously objects to the defendants' use of the phrase "preponderance of the evidence." According to plaintiff's

construction of the Rule, this court must now determine whether or not the evidence considered in a light most favorable to the plaintiff, presents a prima facie case for relief; and, the argument runs, if such a prima facie case is discovered, defendants' motions must be denied. Such a construction of Rule 41(b) has been flatly rejected by the Court of Appeals for this circuit. In *Allred* v. *Sasser*, 170 F. 2d 233 (7 Circ., 1948), it was made clear that in disposing of a motion to dismiss at the close of plaintiff's case, the court, as trier of fact, must weigh and evaluate the evidence. The meaning of Rule 41(b) is unmistakable after a reading of this language from the *Allred* opinion:

> "... the trial court was the trier of the facts, and in considering the evidence was not bound to view it
> 123 in a light most favorable to the plaintiff, with all attendant favorable presumptions, but was bound to take an unbiased view of all the evidence, direct and circumstantial, and accord it such weight as he believed it entitled to receive."

The Rule was similarly construed by the court in *Gary Theatre Co.* vs. *Columbia Pictures Corp.*, 120 F. 2d 891 (7 Cir., 1941), and, more recently, in *Chicago & N. W. Ry. Co.* v. *Froehling Supply Co.*, 179 F. 2d 133 (7 Cir., 1950).

This court is, therefore, under an affirmative duty to review all the evidence thus far presented, and, upon the basis of that review, to determine whether or not the government's evidence warrants the relief sought in the complaint.

I shall first consider all evidence which was introduced to prove violations of the Sherman Act. The evidence may appear disjointed at times; that is because the government necessarily commingled evidence which tends to prove violations of the Sherman Act with evidence which tends to prove Clayton Act violations. I should also note at the outset that I shall consider many items of doubtful relevance and materiality, in another context, such evidence would be excluded summarily. However, as I indi-
124 cated at the trial, in a case of this nature and scope, the government must be afforded any opportunity, within reason, to support the charges in its complaint. Conspiracies of the sort described in the complaint are difficult to prove, and most often can be proved only through the use of evidence which is circumstantial and seemingly remote. Therefore, in my rulings on the evidence at the trial, and in my review of the evidence at this time, I have

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admitted and considered any evidence which might in some manner tend to prove the existence of a conspiracy.

Testimony of Witnesses Tending to Prove the Existence of a Conspiracy to Monopolize Wholesale Customers in the Chicago Area.

A. *Solicitors or "contact men" employed by the defendants.*

Seven government witnesses were, at one time or another, employed by the Borden Company or the Bowman Dairy Company to solicit new wholesale accounts. They testified as to certain instructions given to them in the course of their employment, as to some practices current in the industry at the time of their employment, and as to conversations which they had or overheard during their employment. I have outlined this segment of the tes-
125 timony most carefully, for it is apparently, the most direct available evidence of the alleged conspiracy. Listing these seven witnesses in the order of their appearance at the trial, that part of their testimony relevant to the proof of a conspiracy is as follows:

(1) *William H. Horton.* In 1941 and 1942, Horton was employed by the Bowman Dairy Company as a solicitor. He received a two-week training period from a Mr. Morley, whom he was replacing. Morley told him how to solicit, and what stops to solicit. Morley explained that "open competition" was "new business, business which was closed and reopened after a period of thirty days, and other dairies that were what they call cut-rate dairies, such as Meadowmoor and smaller ones." Morley further explained that "closed competition" consisted of "Borden, Hunding, Capitol, Western", and "one or two other stops that I forget." Horton was told not to solicit "closed competition."

In the early part of 1942, Horton solicited and won the business of a stop being served by the Capitol Dairy Company. Messrs. Philippi and Moller of the Bowman Company directed the return of this stop to the Capitol Company.

126 On cross examination, Horton stated that the Bowman officers said that they desired the return of the store to Capitol because the store owner was a relative of a Mr. Shankman, an official of Capitol Dairy Company.

(2) *Otto A. Sedlak.* Sedlak was a solicitor of wholesale accounts for the Bowman Company for three and one-half years, beginning in 1941 or 1942. In 1942, he was told by

his superior, a Mr. Block, that he was not supposed to solicit stops like "Borden, Capitol, Western-United." He testified of instances wherein his superiors did not permit him to begin serving stops which were then served by Borden or Capitol, although the proprietors were willing to be served by Bowman. He testified that in the latter part of 1944, he overheard Block speaking on the telephone to a Mr. Katz of the Western-United Company. He overheard Block state to Katz: "You know you took one of our stores, don't you? — Do you know what this means? — We have to go out and get one of yours."

127 (3) *Herbert W. Horton.* Horton was also a Bowman solicitor during part of the period embraced by the complaint. Mr. Buthman, an official of the Bowman Company, told him that he "wasn't to solicit any stops, such as Wanzer, Hunding, Beloit, Borden, Western United, Capitol Dairy, and Hawthorne—all the major large ones that was there." Mr. Kernkamp, another Bowman official, told him that "open competition was any stops, like these smaller dairies, like Dean. . . . After thirty days with Dean, if the Dairy that lost them did not retain them, then that was considered open competition, and I could go in and try to get them for the Bowman Dairy also." Horton made clear that his activities were directed principally, perhaps solely, toward the Dean Milk Company. For example, a list of Dean stops was given to him; but the names of stops served by other dairies, even those characterized as "open competition", were not included.

In March or April of 1946, Horton solicited and "lined up" a Dean stop which had formerly been served by Hunding Dairy. Mr. Kernkamp, his superior, told him that Mr. Hunding of Hunding Dairy requested that Bowman abstain from further solicitation because Hunding still had hopes of recapturing the stop from Dean. Nevertheless, a week or so later, Horton related, he managed to get the business of that stop.

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Horton also testified that a Mr. Spitzer, an official of Ridgeview Farms Dairy, told him upon Spitzer's transfer from Bowman to Ridgeview, that "he had worked at Ridgeview before, and that that is the fighting company that Bowman used against the cut-rate dealers."

(4) *Lorne Snoberger.* Snoberger was a Bowman solicitor in 1946. He stated that when he was first employed as a solicitor, Mr. Kernkamp, his superior, told him to solicit stops served by the Dean Milk Company. He was not told

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to solicit stops served by other dairies. During his employment by Bowman as a solicitor, his activities were confined principally to the solicitation of stops served by the Dean Milk Company.

(5) *Julius Guy Johnston.* Johnston was employed by the Bowman Company as a retail route salesman from 1944 to 1946. He was acquainted with the owner of a wholesale stop along his route, who was then being served by the Beloit Dairy Company. He asked a Mr. Scanlan, his manager, for permission to serve the stop. Scanlan told him that Bowman had an "agreement" with Beloit, "but you go ahead and serve it for awhile and see what happens." Scanlan said that "We might have to give up another stop
129 equivalent to it in order to keep it." Johnston began serving the stop, served for about a week, and was then told by Scanlan to discontinue service. Scanlan again stated that "we would have to quit serving or give up a stop to Beloit equivalent to that." Johnston suggested to the owner that he take milk from another dairy for thirty days; the owner did in fact take milk from the Wanzer company for thirty days, and then resumed Bowman service.

In the latter part of 1945, when one of the witness' stops was solicited by Borden, Mr. Scanlan told the witness: "We have an agreement with Borden, if they take the stop away from us we will get another one in return equivalent to it."

On cross examination, the witness admitted that he was accused of having a "short book" by the Bowman Company after he left that company's employ.

(6) *Raymond Stephens.* Stephens was a solicitor of wholesale accounts for the Borden Company. He was told by a Mr. Creed, his superior, not to comply with requests for service by stops then being served by Bowman, Western-United, Hawthorn-Mellody, and Capitol. According to Stephens, "open competition" consisted of stops served by the Dean Milk Co., Wanzer Dairy Company, and
130 Meadowmoor Dairy Company.

Subsequent to Stephens' employment by Borden, he was a vendor supplied by the Lake Valley Company. After successfully soliciting a stop served by Bowman, he had a conversation with a Mr. Curtin of the Bowman Company, and was told by Curtin to return the stop. He did return the stop, so that Bowman would not "bother" his accounts.

(7) *Sam Parker.* During part of the period embraced by the complaint, Parker was a wholesale foreman employed by the Borden Company. In the fall of 1944, his superior, a Mr. Creed, did not permit him to serve a wholesale stop which was then served by the Bowman Dairy Company.

Each of these witnesses is a former employe of one of the defendants, and each expressed some degree of animosity toward his former employer. Johnston, in particular, was hostile during cross-examination, and as I noted earlier, the Bowman Company had once accused him of dishonesty. The testimony of each of the witnesses is, therefore, open to some suspicion. Assuming arguendo that all of the foregoing testimony is true, however, just what relationship among the defendants is indicated?

131 There are but three instances of direct communication between alleged conspirators. First, William Horton testified that he returned a stop to Shankman of the Capitol Company, pursuant to orders given by his superior at the Bowman Company. There is testimony to indicate, however, that the owner of the stop was related to Shankman, and that the return of the stop was motivated by respect for that relationship. Second, Sedlak testified that he overheard his superior at Bowman tell Katz of Western-United that Bowman would "get" a Western stop in exchange for a stop which Western had captured from Bowman. This testimony is as consistent with competitive activity as it is with a conspiracy to monopolize. Third, Herbert Horton testified that Hunding asked Bowman not to solicit a stop formerly served by Hunding. This testimony is rendered meaningless by Horton's later assertion that Bowman thereafter successfully solicited the stop.

The testimony does indicate one rough similarity between the actions of Bowman and Borden, insofar as Stephens, a Borden solicitor, testified that he was instructed by his superior not to comply with requests for service by stops served by Bowman, Western-United, Hawthorn-Mellody, and Capitol. Three Bowman solicitors testified that

132 they were similarly instructed not to solicit stops served by Borden and certain other dairies. However, the court notes that the instructions which these solicitors said they received are at variance with the terms of the conspiracy alleged in the complaint. One Bowman solicitor and one Borden solicitor testified that they might solicit stops served by Meadowmoor; but Meadowmoor is alleged to be one of the conspirators. One Bowman solicitor testi-

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fied that he could ont solicit stops served by Wanzer, although Wanzer is not alleged to be a conspirator. And I note in passing that witness Rhody, a Hunding employe, testified that Hunding, an alleged conspirator, did in fact capture stops served by other of the alleged conspirators.

B. *Wholesale customers served by the defendants.*

The foregoing portion of the record should be considered alongside the correlative testimony of wholesale customers served by the defendants. The government introduced over two dozen witnesses who owned food stores or restaurants in the Chicago area. The testimony of a few of these witnesses corroborates, in a limited way, that of the solicitors employed by the defendants. This corroborative testimony is as follows:

(1) *Richard Myers.* Myers owns and operates a food store in Chicago, and has sold milk supplied by the
133 Capitol Dairy Co. ever since he opened his store in 1946. A representative of the Borden Company told him that unless he was served by Borden from the first day he opened his store, he could not thereafter switch to Borden's. Myers testified that since he began using the services of Capitol, he has not been solicited by dairies other than the Kraml Co. and the Dean Milk Co.

(2) *Louis J. Pushauer.* Pushauer owns and operates a grocery in Chicago. In 1951, the Dean Milk Co. supplied some of his dairy needs and Hunding Dairy supplied others. During the time he split his orders between Hunding and Dean, a Hawthorne representative came to Pushauer's store and inspected his dairy supplies. The next day Hunding Dairy discontinued service. A similar incident occurred while the witness was later being served by Western-United. The witness further testified that the Borden Co. did not respond when he called for service.

(3) *Michael J. Cozzi.* Cozzi owned a grocery store in Chicago and was served by Meadowmoor Dairy. He moved his store, became dissatisfied with Meadowmoor Milk, and accepted Bowman's offer to serve. Meadowmoor thereafter solicited Cozzi's business once again. The Meadowmoor solicitor told Cozzi of a "gentlemen's agree-
134 ment" among the milk companies not to solicit stops within thirty days after service has been discontinued. The witness was not articulate when speaking of this "agreement." Meadowmoor did begin to serve Cozzi again, although it is not clear at whose instance the change was made.

(4) *Julius Soboleski.* This witness owns a grocery in Chicago, and is served by the Borden Co. A Bowman representative told him that Bowman could not serve "as long as I have Borden."

(5) *Philip Bergman.* Bergman owned a grocery in 1947, and was served by the Borden Co. Borden refused a request for financial assistance, and Bergman called Meadowmoor. The Meadowmoor representative said, in the words of the witness, "That he couldn't take the stop over because they had an association with some of the bigger companies not to take stops from each other." The Meadowmoor representative further stated, again in the words of the witness, that "I had to farm out for at least thirty days for a smaller company, and then they would take the stop over." The Meadowmoor representative did not suggest another dairy, but the witness called the Dean Milk Co. After a month of Dean service, Meadowmoor consented to serve.

135 (6) *Gerald T. Killeen.* Killeen owns a delicatessen in Chicago. At the time he purchased his store, Borden and International Dairy were supplying his milk needs. He desired Ridgeview service, and, after telephoning Ridgeview, a Ridgeview representative came to his store. The Ridgeview representative said, in the words of the witness, that "First he would have to notify those two dairies, and give them a chance to hold the stop." Although the witness called neither Borden nor International, he testified that representatives of both dairies visited him and knew of the contemplated change. The witness switched to Ridgeview anyway, and Ridgeview has been serving him ever since. And, according to the witness, Borden solicited his business even after he changed to Ridgeview. On cross examination, the witness admitted that he may have told the Borden driver about the intended change.

(7) *Louis Miller.* This witness owns a restaurant in Chicago. While he was served by Hawthorn-Mellody, a Hawthorn representative told him that he could not change to another dairy. A Meadowmoor representative told him that Meadowmoor could not serve because of an "agreement." Subsequently, the witness was served by the Wanzer Co. and the Capitol Co. Throughout his testimony,
136 the witness made clear that he asked each dairy for some sort of financial assistance.

I shall now turn to testimony of other wholesale customers served by the defendants. A small part of this

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testimony is corroborative of that of solicitors employed by the defendants; another and much larger part of this testimony flatly contradicts that of the solicitors, and another part of this testimony is wholly irrelevant to any of the issues in this case.

(8) *Myer Freedman.* Freedman operates a grocery in Chicago, and receives his milk from the Bowman Co. Since Bowman began to serve, only the Dean Milk Co. has bid for his business.

(9) *Dorothea Wallace.* This witness operates a restaurant in Evanston, Illinois. She was served by Bowman, and became dissatisfied with Bowman service. A representative of Hawthorn-Mellody told her he could not serve her. Afterward, however, the Hawthorn representative made arrangements for the witness' employes to pick up milk from a nearby store served by Hawthorn. This arrangement continued for two or three weeks; afterward, Hawthorn delivered the milk directly to her restaurant.

On cross examination Mrs. Wallace admitted that she made no effort to contact another dairy.

137 (10) *Michael Glaser.* Glaser owned a grocery in Chicago, and was served by the Borden Co. When he requested service from Meadowmoor, the Meadowmoor representative told him that Meadowmoor could not serve unless the witness first purchased Wanzer milk for four weeks. The Meadowmoor representative also told the witness, and I quote, "They have an association that they can't put milk in a store by taking a stop away from another stop." On cross examination, the witness stated that it was his impression that there was an association of all the dairies, including the Wanzer Co.

(11) *Andrew D'Alesandro.* This witness formerly owned a restaurant in Chicago. When he first opened his restaurant, he was solicited by representatives of Western-United, Wieland, Borden, and Beloit. He was solicited to the point of annoyance.

(12) *Abraham Wittenberg.* Wittenberg operates a sandwich shop in Chicago, and was originally supplied his milk needs by Western-United Dairy. In 1947, he closed his shop for a few months. While his stop was closed, representatives of Borden, Western-United, Capitol and Meadowmoor bid for his business. He accepted Meadowmoor's offer, and has been served by Meadowmoor ever since.

138 (13) *Karol Walczak.* Walczak operates a grocery in Chicago. During his ownership of the grocery, many dairies bidded for his business. Among the bidders were Dean, Capitol, Borden, Western-United, and Ogden-Schmitts. Even after he accepted Capitol's offer and began selling Capitol milk, the dairies continued to bid for his business.

(14) *Chester Ratajczyk.* This witness owns a grocery in Chicago. While he was served by Hawthorn-Mellody, he gave a Hawthorn representative an "ultimatum". Unless Hawthorn gave the witness an ice box within thirty days, the witness would discontinue Hawthorn service. The Hawthorn representative thereupon told the witness of a "working agreement" between dairies, which prevented storekeepers from moving from one dairy to another. The witness interpreted this statement as a "challenge," and began taking milk from the Dean Milk Co.

(15) *Samuel Pritzman.* This witness owns a grocery and meat market in Chicago. While he was served by Western-United, he noted that the Robinson Dairy served a restaurant across the street from his store. He asked the Robinson driver to serve; the driver refused. The witness moved his store in 1949, and discontinued Western-United service. He was then served by Dean and Wenzer for
139 three months, and thereafter by Meadowmoor.

(16) *Martin Biliack.* Biliack owns a grocery in Chicago. While he was served by International Dairy, a representative of Hawthorn-Mellody told him that Hawthorn could not begin service. The Hawthorn representative further stated, in the words of the witness, that "if I took another dairy that was out of the organization, that I would be able to talk business with him. . . ."

The witness also testified that he is now served by Hawthorn, and that the Meadowmoor company bid for his business just two weeks ago.

If any useful purpose could be served by further summarizing testimony of this type, I would do so; but the remaining witnesses add little, if anything, to what has already been repeated. I shall therefore confine my comments to the testimony of the sixteen witnesses recounted above.

Even a cursory reading of this segment of the testimony, much of it pure hearsay at best, reveals glaring inconsistencies. According to some dairy representatives who

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called upon the storekeepers, certain non-defendant dairies are parties to the objectionable "agreement" or are members of the "association." See, for example, the testimony of witness Biliack. Some of the dairy repre-
140 sentatives told some of the storekeepers that they were unable to solicit the business of defendant dairies; it is apparent from the testimony of other storekeepers, however, that the representatives of some defendant dairies did solicit the business of stores served by other defendant dairies. See, for example, the testimony of witnesses D'Alesandro, Wittenberg and Walczak.

This testimony, viewed cumulatively, fails to reveal any consistent pattern of business conduct among the defendants. It does reveal, however, a continuous shuffling of customers between defendants and nondefendants, and between defendants themselves. Such a shuffling is certainly not consonant with the existence of a monopolized market.

C. *The witness Eggleston.*

I shall now turn to the testimony of witness Eggleston. Eggleston is a former officer of and a present stockholder in the Bowman Dairy Company. The government conducted a lengthy examination of Eggleston as an adverse witness, and, as a result of that examination, discovered only two instances of direct communication between the defendants. The first communication concerns the formation of defendant Ridgeview by Bowman Dairy Com-
141 pany.

The record shows that Eggleston took an active part in negotiations between Bowman and a union of dairy employees. The record also shows that representatives of various dairies often met to discuss labor problems, and that Eggleston represented Bowman at the meetings. At one such meeting, held some time in 1939, Eggleston discussed the formation of Ridgeview with Mr. Baril, and either Mr. Smaha or Mr. Koenig, all of the Borden Company. During this discussion, the Borden representatives told Eggleston that they too were considering the formation of a subsidiary. Eggleston stated, at page 477 of the transcript:

> "I believe I told them that they were going to use Ridgeview strictly as a distributor company and operate it exclusively with vendors in order to meet such competition as Meadowmoor and Lake Valley, and they mentioned at that time that they were considering very seriously of doing something along the same line."

Eggleston further stated, at page 481 of the transcript:

> ". . . the understanding we had was that we would not use Ridgeview to go out and start a price war against the Borden Company, and they said if they
142 went through with the proposition on Belmont that they would use it strictly to fight vendor competition and to meet the vendor competition."

This is the aggregate of the Government's evidence concerning this meeting between representatives of the two companies. The day after Eggleston's testimony about the meeting, the Government cross-examined him at length again, but his version of the meeting remained substantially the same, and no new evidence was adduced. See the transcript at page 523, et seq.

The court first notes that this is an isolated meeting between two of ten alleged conspirators, and that it took place over twelve years ago. The court next notes that the discussion between Eggleston and the Borden representatives took place at a labor negotiation meeting, where, apparently, a variety of topics were "discussed." And finally, the court notes that Eggleston testified, at page 483 of the transcript, that Bowman did lose stops to the Belmont Company, despite the reported assurance from Borden that this would not happen.

The next and final instance of direct communication between alleged conspirators, reported by Eggleston, concerns a meeting attended by Eggleston and Messrs. Peters and Lipsky of Hawthorn-Mellody at the Lake Shore
143 Club in Chicago. The three men discussed a "price war" between Hawthorn and Ridgeview; the discussion lasted 30 or 40 minutes. This, in the words of Eggleston, is the substance of that discussion:

> "We both admitted that we were very foolish for getting into a price war, that neither one of us was making any headway; the only one that was benefiting by it was the storekeeper . . . Mr. Lipsky said that they didn't want to sell milk below their cost. And I told them we didn't want to sell milk below our cost. . . . If we can get any account at our price, we are going to take it, but it is not our policy to start a price war." (Tr., 545 et seq.)

And this is the aggregate of the government's evidence concerning this second meeting. Here again, the government offers evidence of an isolated meeting between two of ten

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alleged conspirators; a meeting which took place many years ago.

D. *The witness Heinz.*

The final segment of testimony offered by the government to establish the alleged conspiracy is that of the witness Heinz, who spoke of events in 1940 and 1941, while he was manager of the Evanston Branch of the Bow-
144 man Dairy Company. Counsel agreed that Heinz's deposition, taken just before the trial, might be used as evidence at the trial.

Heinz testified that he had frequent meetings with Kastner, who was manager of the Evanston Branch of the Borden Company. According to Heinz, these meetings took place in Evanston restaurants about once every two weeks. At the meetings, Heinz goes on, he would "trade stops" with Kastner. That is, each would determine the amount of business he had taken from the other during a given period, and arrange to return a like amount during a subsequent period. Heinz further testified that at the beginning of each school year at Northwestern University, he and Kastner would agree on the price of milk each would serve to fraternities and sororities at that school.

Unfortunately, the court was unable to view Heinz on the witness stand; I would then be in a position to judge his credibility. The court did view Eggleston on the stand. In certain respects, Eggleston's testimony negates the material contained in Heinz's deposition. Since I believe Eggleston was, over all, a truthful witness, and since there is nothing in the record to corroborate Heinz's testi-
mony, I must discount that testimony. It should be
145 noted also that here, again, the Government offers evidence of alleged meetings which took place over twelve years ago between two of ten alleged conspirators.

E. *The witness Newey.*

I shall conclude my review of the oral testimony with a comment upon the government's final witness, Newey. Newey is an attorney. He was employed by McConnell, another attorney, who represented the Dean Milk Co. in a private antitrust suit brought against certain Chicago dairies, including two of the defendant dairies. The *Dean* Case is still pending before another judge of this court.

At McConnell's direction, Newey set out to gather evidence in support of the Dean complaint. Newey set up tape recording devices in a store served by the Dean Milk Co., and, posing as owner of the store, invited solicitation

by certain of the defendants. Newey recorded his conversations with each of the solicitors who called at the store. At an early stage of the trial, the Government attempted to subpoena the recordings from McConnell; this court held, and McConnell urged that it hold, that the recordings constituted a lawyer's work product, and that this court could not therefore order their production for use at the trial.

146 Instead of using the recordings at this trial, the government summoned Newey, and asked him to state the substance of each conversation he had with solicitors employed by the defendants. Newey had little, if any, independent recollection of any of the conversations. After each question was asked, he read extensively from transcripts of the recordings and from personal notes based upon those transcripts. His answers were almost all based upon such an extensive reading. In one instance the court noted that Newey read for twenty-two minutes before answering a single question—and this was during direct examination.

I held at the trial, on the basis of *United States* v. *Riccardi*, 174 F. 2d 885 (3 Cir., 1949) and the cases cited therein, that Newey's testimony had little independent probative value, but that the testimony might be admitted for what it is worth. I now hold that the testimony is valueless. It consists, for the most part, of a series of conclusions by Newey, admittedly extracted from the transcripts of the recordings to suit the government's convenience. I shall therefore completely disregard the testimony of witness Newey.

This concludes my review of the oral testimony.

147 I shall now summarize some of the documentary evidence offered by the Government to establish the alleged conspiracy.

A. *Sales Committee Minutes.*

A major portion of the documentary evidence consists of a series of minutes of meetings of the Sales Committee of the Bowman Dairy Company. Before considering the relevant matter contained in the minutes, I shall comment briefly on the limits of their probative value. First, the subject meetings occurred over a relatively short period of time and more important, during a relatively early period. The earliest meeting which is evidenced by the minutes took place in March 1941; the latest in February 1943. Second, little of what is contained in the minutes represents

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positive policy or affirmative acts on the part of the Bowman Company; rather, most of the matter contained in the minutes represents informal, sometimes rambling discussion by Bowman officers concerned with a variety of phases of Bowman business. Third, some of the information contained in the minutes is an obvious parroting of gossip gleaned by Bowman employes and others. See, for example, Exhibit 43, which contains a "report from a laundry driver." And the witness Eggleston, who was present at the meetings, testified time and again that
148 much of the matter contained in the minutes was based upon gossip and rumor.

The minutes do have some probative value, however, in that they present an over-all picture of the matters which concerned the persons who directed the sales policies of the Bowman Dairy Company during the years 1941 to 1943. During the trial, the Government extracted bits of material from each of the minutes, and the government now contends that this extracted material, viewed cumulatively, constitutes evidence tending to prove the alleged conspiracy. The very nature of the Sales Committee minutes make this effort unrealistic. Nevertheless, I shall review some portions of the minutes which are seemingly consistent with the conspiracy alleged in the complaint. These portions are as follows:

Exhibit 41, dated June 17, 1942:

> "(2) Mr. Buthman discussed the Veterans Hospital at Great Lakes and the Great Lakes bid, also Navy Pier and the Hines Hospital."
>
> "(3) Mr. Peck said that he and Mr. Eggleston would plan a meeting with the North Side people early next week."

Exhibit 42, dated August 11, 1942:

> "(11) Mr. Buthman discussed with the Committee the milk business at the Great Lakes Naval Train-
> 149 ing School, Glenview Airport, and Navy Pier. Plans were made for securing our share of this business in the future."

Exhibit 43, dated April 8, 1942:

> "(9) Mr. Peck told the Committee that Cream Crest Dairy are a consistent trouble-maker on the North Shore with their plugged bottle. He spoke of rumors that they are for sale."

"(19) Mr. Larson asked Mr. Peck to consider the possibility of Ridgeview's submitting a bid for Ft. Sheridan next month. Mr. Peck said he would discuss this with Mr. Rehorst."

Exhibit 44, dated December 16, 1941:

"(1) Mr. Eggleston told the Committee of a report from Mr. Kettell that Hawthorn-Mellody have instructed their vendors to take business from anybody with no restrictions of any kind."

Exhibit 46, dated October 2, 1941:

"(17) Mr. Larson told the Committee of a conversation with Mr. Ekberg, and passed on a suggestion that Ridgeview's retail routes should be discontinued and the business transferred to Bowman. The loss of $1,100 per month on these routes is not justified, because they do not help us control the price situation as do the store routes."

Exhibit 48, dated October 13, 1942:

"(9) Mr. Peck said that Hawthorn's prices in Highland Park's territory were down to 10¢ a quart to stores. Ridgeview is continuing the fight with Hawthorn."

"(10) Mr. Larson spoke of desperate efforts by Dean to secure independent store business in neighborhoods where National Tea is closing small stores."

Exhibit 49, dated October 20, 1942:

"(4) The Committee discussed the present fight with Hawthorn-Mellody and the score was reported as being approximately two to one in our favor."

Exhibit 50, dated September 16, 1941:

"(15) . . . There is some price cutting in the factory business, and the Committee agreed to consider a temporary Ridgeview factory route to meet this situation."

Exhibit 59, dated April 29, 1941:

"(12) Mr. Peck told of low Borden prices in the Evanston area, and after some discussion it was decided to ask Mr. Boril and Mr. Koenig of the Borden

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Company to have lunch with Mr. Eggleston and Mr. Peck next week."

151 Exhibit 60, dated August 4, 1942:

"(6) Mr. Peck asked the Committee to be certain that all divisions comply fully with the recent memorandum regarding bids on Government business. All such bids are to be sent directly by the Government agency to Mr. Peck at Head Office, and each division is to send a list of such bids and when they are usually received so that any discrepancy can be immediately followed up."

"(16) Mr. Buthman discussed Glenview and Great Lakes and relations with a certain competitor."

Exhibit 71, dated May 19, 1942:

"(11) Mr. Peck told the Committee that Cuneo has not been observing the truce on the North Shore. He said that he had instructed Heinz and Rehorst to call Mr. Peters."

"(22) Mr. Larson reported that Wanzer denied paying 10% on deadbeat collections. Evidently this was merely an excuse by Borden."

Exhibit 83, dated April 28, 1942:

"(14) Mr. Peck told the Committee that Borden's excuse, when asked about paying 10% on delinquent collections, was that Wanzer has been doing it for some time."

152 Exhibit 739, dated July 30, 1942:

"(12) Mr. Buthman reported trouble with Shankman regarding the Hillman store on State Street. . . . Goldblatt's across the street are complaining. Mr. Peck asked Mr. Buthman to call Shankman again and try to straighten the situation out."

The paragraphs I have just quoted are a fair representation of those parts of the minutes which the Government claims tend to establish the existence of a conspiracy. During oral argument, counsel for defendant aptly illustrated that many of the paragraphs, when viewed with other evidence adduced at the trial, are as consistent with innocence as with guilt. The court agrees. But the court does not intend to view and to construe each bit of the

minutes separately, for each bit becomes meaningless when removed from its text. Each of the minutes must be viewed as a whole, and, so viewed, each is more consistent with a competitive market than with a monopolized market. If the extraction of single paragraphs is at all meaningful, then a series of paragraphs may be constructed which tend to prove that the Bowman Company was concerned with competing, and not conspiring to monopolize. Consider, for example, the following extracts from the minutes:

153 Exhibit 41, dated June 17, 1942:

"(9) Mr. Larson reported that approximately one-half of Meadowmoor stores in Englewood division are selling at 11½¢.

"(10) Mr. Larson said that factory stores served by Borden, who have the concession system at the New Republic Steel plant, have been unable to displace the two routes we have on the premises because of the support of the Republic Steel employees."

Exhibit 43, dated April 8, 1942:

"(3) Mr. Eggleston told the Committee that Borden's have been furnishing neon signs for some of their stores.

"(6) Mr. Peck told the Committee about a report that Borden's are paying their drivers 10% on all delinquent collections."

Exhibit 49, dated October 20, 1942:

"(12) Mr. Larson mentioned that the 79th Street area has been kicking up again with Capitol Dairy breaking down prices."

Exhibit 51, dated February 17, 1942:

"(3) Mr. Eggleston reviewed with the Committee the competitive situation, with particular reference
154 to Bowman stores that have been split by our competitors using half-gallon bottles. It was agreed to get a list of all such stops and to turn them over to Ridgeview in an effort to serve them with Ridgeview half gallons rather than with the half gallons of the competitors."

"(18) The Committee approved Mr. Larson's request that a space be provided on the new customer

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memo to indicate the dealer from whom the business was taken. Such a space was formerly provided, but in the reprinting it had been eliminated."

Exhibit 52, dated July 15, 1941:

"(3) Mr. Eggleston asked about the raise in pint prices, and reports were favorable from our entire territory with the exception of North Chicago, where competition for factory business makes it impossible to put the raises in effect at this time."

Exhibit 55, dated November 18, 1941:

"(9) Mr. Peck told the Committee about information received by Mr. Heinz that the Borden Co. is transferring all routes south of Howard and west of Cicero from Evanston to Chicago divisions. . . . According to reports we have received, there is a great
155 deal of dissatisfaction among Borden employees at this time."

Exhibit 70, dated February 4, 1942:

"(1) Mr. Eggleston suggested that all divisions be asked to compile a list of stores that quit them, and new stops that they acquire at the end of each month, showing the number of points involved in each case, and the competition to whom or from whom the stop was transferred. The Committee agreed.

"(4) Mr. Peck said that Hawthorn-Mellody had been bothering the Moraine Hotel in Highland Park with low prices, but stated that we would hold the business."

Exhibit 71, dated May 19, 1942:

"(28) One of Meadowmoor's recent offers to a Bowman store included the following: 10½¢ price, neon signs, cash, free hand bills, a free post card mailing, and a bargain cream deal."

Exhibit 79, dated March 11, 1942:

"(17) Mr. Eggleston told of a rumor from New York that Borden has a contract to serve all the A&P stores in Cook County. The Committee agreed to have divisions get names and addresses of all Borden
156 independent stores, and to star the names of good prospects, but to do no soliciting now."

These paragraphs from the minutes tell about a group of men who are very much concerned with competition. These paragraphs reveal the distrust of a competitor, rather than the trust of a conspirator. These paragraphs, standing alone, are as consistent with competition as the other paragraphs, standing alone, are consistent with a conspiracy to monopolize. But as I stated earlier, it is unreal to view any of the paragraphs alone; the minutes must be viewed as a whole. And, after a careful appraisal of the hundreds of pages which form the minutes, I am of the opinion that they do not tend to show that Bowman conspired to monopolize sales of fluid milk to wholesale purchasers.

B. *Other documents.*

The government introduced a variety of other documentary material, which, it contends, tends to establish the existence of the alleged conspiracy. This documentary material is marked by the absence of intercompany correspondence. It is marked by the absence of any reference to any inter-company agreement. It is marked by the absence of any reference to any inter-company understanding of any sort. Indeed, the court is more impressed
157 with what the documents fail to show rather than that which the documents show.

The court has carefully reviewed and considered each of the documents offered by the Government. Many of the documents are wholly irrelevant to any of the issues of this case. See, for example, Exhibit 37, which is a letter from one Bowman official to another, typewritten on the stationery of the Bowman Dairy Company. The author of the letter first refers to "employees who are not buying our products directly." He then goes on to state:

> "Vernon Buehl, 1718 W. 61st Street, is a single man and lives with his parents in the rear of a small store at this location. This is a Borden stop, as we understand, and they have been trying to change for some time but apparently without success. We believe you know more about this situation than we do, so that account would be entirely in your hands."

The Government introduces this as independent proof of an alleged conspiracy.

Other documents, seemingly consistent with an allocation of customers among the defendants, were explained

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credibly and rationally by Government witnesses at
158 the trial. The explanations demonstrated, at least to
the Court, that the documents did not tend to prove the existence of a conspiracy. See, for example, Exhibit 16, which is a letter on the stationery of the Bowman Company and signed by a Bowman official. The letter contains the following language:

> "The following is a list of parochial schools in your territory which did not operate under the penny milk program last year. The penny milk program is available to all parochial schools this year and they may give the business to any dairy they wish. Schools served on the penny milk program last year must retain the same dairy they had."

Metzger, who signed the letter, testified (Tr. 324) that the head of the School Board had requested the dairies not to solicit those schools which had operated under the "penny milk" program the previous year, and that Exhibit 16 was written to comply with that request. The explanation is simple, and it is consistent with the language of the letter. Similar explanations were offered for other documents; the court need not repeat all of them at this time. It is true that some of the material in the documents may
have more than one meaning; and, if the court as-
159 sumes the existence of a conspiracy, the meaning
offered by the Government is certainly proper. But I cannot make such an assumption. I must first search the documents to determine whether they tend to show an agreement among the defendants, or at least permit a reasonable inference of such agreement. I find neither agreement nor implication of agreement.

Evidence Tending to Prove the Existence of a Conspiracy to Allocate the Fluid Milk Business of Certain Public Institutions.

It is charged in paragraph 44 of the complaint that "the defendants have allocated or attempted to allocate among themselves the sales of fluid milk to public institutions in the Chicago area and its vicinity by means of a scheme involving the use of prearranged, bogus and collusive bids." It is charged that such bids were made to one municipal institution (Chicago Municipal Tuberculosis Sanitarium), four Cook County institutions, (County Jail; Juvenile Detention Home; County Hospital; and Oak Forest Infirmary), and five Federal military installations (Vaughan

General Hospital, Hines, Illinois; United States Naval Training Station, Great Lakes, Illinois; United States Naval Training School, Chicago, Illinois; United
160 States Marine Hospital, Chicago, Illinois; and United States Army, Fort Sheridan, Illinois).

During oral argument, counsel for the government stated that the alleged allocation of the milk requirements of these public institutions among the defendants was part of the over-all conspiracy charged in the complaint; and paragraph 27 of the complaint specifically lists the submission of prearranged bids and the allocation of the business of these institutions as part of the terms of the alleged over-all conspiracy.

The Government relies mainly upon documentary evidence to establish this particular section of the alleged conspiracy. There is some testimony in the record which the Government contends does help establish this part of its case, however, and before commenting upon the documentary evidence, I shall summarize that testimony.

Albert Bello testified that during the years 1941 through 1945 he owned the Bello Dairy in Chicago Heights, Illinois. He successfully bid for the milk requirements of the Oak Forest Infirmary in the second quarter of 1942. While the county was still indebted to him for milk supplied during that quarter, Messrs. Shankman and Fried of Capitol
161 Dairy Company told him that the county would pay its debt only if he stopped bidding for the Infirmary business. Bello did not yield to Capitol during this conversation, but he did later. Bello's testimony indicates that he subsequently refrained from bidding for the Infirmary business. Bello further testified that representatives of the various dairies stood near each other just prior to the bidding at the County Building.

Hans Moser's testimony concerned the Beloit Dairy Company. Moser, who is vice-president of the Lake Valley Farm Products, stated that after he had successfully bid for the business of the Municipal Tuberculosis Sanitarium, Mr. McGuire of Beloit Dairy called him, and said that Beloit and Hawthorn-Mellody handled the Sanitarium business. McGuire threatened to actively solicit Moser's accounts if Moser continued to bid, and, according to Moser, McGuire did thereafter actively solicit his accounts. John K. McVeigh's testimony contains much the same material with reference to Beloit Dairy Company.

Patrick Cunningham, who is president of Cunningham Farms, testified that after he had successfully bid for the

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milk requirements of the County Hospital, Mr. Kettell of the Bowman Company censured him for encroach-
162 ing on a Bowman account. He also testified as to collusive bidding with reference to the school milk program. Cunningham's testimony further indicates that after he successfully bid for the requirements of the Municipal Tuberculosis Sanitarium, Mr. McGuire of Beloit Dairy Company threatened to capture Cunningham accounts. Beloit thereafter took the Home for Incurables, a large account, away from Cunningham.

This testimony establishes the occurrence of four similar incidents. Each incident involves the action taken by one defendant dairy when another dairy attempted to capture an account. Beloit, for example, looked upon the Sanitarium as "its account;" and Beloit became aggressive when another dairy bid for Beloit business. The court holds however, as it must, that these four isolated instances cannot establish the existence of a conspiracy among ten defendant dairies.

I turn now to the documentary evidence relating to this part of the alleged conspiracy. Exhibits one through eleven (Schedules VIII through XVIII of the Pre-trial Order) are tabulations of bids made by dairies for the milk requirements of the aforementioned public institutions. Each exhibit sets out all bids made at a given institution for a period of about ten years, and denotes awards
163 made by the institution for each bid period. The basic documents from which these tabulations were made are not in evidence, but they have been available for inspection by counsel throughout the pre-trial conference and the trial.

The Government asks the court to draw certain inferences from the material shown in Exhibits one through eleven. The Exhibits show, for example, that particular defendants have repeatedly submitted low bids to particular institutions. This, says the Government, is a basis for inferring that there was repeated collusion among all the defendants. During oral argument, the Government spoke about patterns in the bidding, and illustrated, through colored charts, what is shown in Exhibits one through eleven: that certain defendants were alternately successful in bidding for the business of certain institutions. This, says the Government, is a basis for inferring that some of the defendants shared the business of certain institutions by agreement. Exhibits one through eleven show that defendants Belmont, Meadowmoor, and Hunding never bid

for the milk business of any of the eleven institutions. This, says the Government, is a basis for inferring that these defendants agreed to refrain from bidding.

164 The Government also points out that in some instances certain defendants submitted different bids to two different institutions, although the two institutions appeared on one bid form. Defendants answer that this was done by nondefendant dairies too.

The Government showed during oral argument that in some instances, a defendant submitted a bid which was higher than that submitted by another defendant which bid successfully the preceding bid period. This, says the Government, is a basis for inferring collusion. Defendants answer by demonstrating that in each of Exhibits one through eleven, there are instances of nondefendants who submitted bids which were higher than that submitted by a defendant which bid successfully the preceding bid period.

This court is frank to admit that it is unwilling to draw any inferences on the basis of Exhibits one through eleven. These exhibits demonstrate nothing more than a disposition on the part of certain defendants to bid for the milk requirements of particular public institutions.

The Government has introduced other documents which, it contends, tend to prove a conspiracy to allocate the milk requirements of these public institutions. A major

165 portion of these consists of the minutes of the Sales Committee meetings; I commented fully upon these minutes in an earlier part of this memorandum. I have reviewed all the other documents relevant to this segment of the conspiracy, and I have found that the Government cannot ground its case upon them.

This completes the court's review of all the evidence relevant to the alleged violations of the Sherman Act. Needless to state, there is no direct evidence of an agreement or understanding among the defendants. There is no evidence of intercorporate communication or of significant meetings between alleged conspirators, although the evidence purports to cover a period of over twelve years. The Government must rely, then, upon inferences drawn from the conduct of the defendants. This court is aware that such inferences, when properly drawn, may support a finding that there was, in fact, an agreement. In *Interstate Circuit* v. *United States*, 306 U. S. 208, 226-7, the Court made clear that an agreement is not a prerequisite to an unlawful conspiracy. The Court went on to state:

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"It is elementary that an unlawful conspiracy may be and often is formed without simultaneous action or agreement on the part of the conspirators. . . . Ac-
166 ceptance by competitors, without previous agreement, of an invitation to participate in a plan, the necessary consequences of which, if carried out, is restraint of interstate commerce, is sufficient to establish an unlawful conspiracy under the Sherman Act."

However, in order to bring its case within the doctrine set forth in *Interstate Circuit*, the Government must establish parallel conduct on the part of each of the alleged conspirators.

There is evidence which tends to prove that some of the alleged conspirators, particularly Bowman and Borden, engaged in similar courses of conduct in one respect, Bowman and Borden refrained from actively soliciting each other's accounts. Instead, the evidence now before the Court tends to prove that each channelled its solicitation efforts toward new accounts, and toward accounts served by the Dean Milk Company. From such similar conduct, may this court properly infer that that those defendants were participants in some plan?

Reasonable businessmen will act similarly when presented with the same problem. This record shows that Bowman and Borden, and every other major dairy in the
167 Chicago area for that matter, were presented with the same problem—the advent of the Dean Milk Co. This record further shows that Bowman and Borden repeatedly lost accounts to the Dean Milk Co. Bowman and Borden each instructed its solicitors to attempt to recapture accounts lost to Dean. If Bowman and Borden agreed to do this in concert, they have certainly run afoul of the antitrust laws; but there is no evidence to indicate that Bowman and Borden did act in concert. The Government merely demonstrates that Bowman and Borden acted similarly, and asks this Court to infer a concert of action. I cannot in good conscience draw such an inference. There is testimony in the record to indicate that Bowman and Borden each acted reasonably under the circumstances; this Court cannot and will not presume bad motives.

The Government must present independent evidence to prove that the defendants were participants in a plan. Thus far, the Government has failed to present such evidence. I must therefore hold that the defendants were not parties to an agreement or understanding as alleged in the complaint.

Counsel for the Government correctly stated during oral argument that the Government's cause of action
168 under Section 2 of the Sherman Act presupposes a finding that there was an unlawful agreement among the defendants. If the defendants are considered collectively, they certainly do monopolize the market defined in the complaint; but for the reasons stated, the defendants may not be considered collectively. And, as the evidence shows, no single defendant exercises monopoly power over the market defined in the complaint.

The motion of each defendant to dismiss that part of the complaint which charges violations of Sections 1 and 2 of the Sherman Act must be granted.

The Court shall now consider the alleged violations of Section 2(a) of the Clayton Act, as amended, 15 U.S.C.A. Sec. 13(a). That Section prohibits certain discriminations in price between purchasers of commodities of like grade and quality. This Court has held that in a suit brought under Section 2(e) of the Clayton Act, the plaintiff must affirmatively establish the occurrence of two sales; and that unless two sales are shown, the plaintiff cannot prove the alleged discrimination. *Chicago Seating Co.* v. *S. Karpen & Bros.*, 83 F. Supp. 409 (1949). That construction of Section 2(e) was upheld by the Court of Appeals, 177 F. 2d 863. Further, the Court of Appeals recognized in
169 its opinion that Section 2(a) should be similarly construed. In the instant case, the Government has proved the occurrence of only one sale by the Beloit Dairy Company; that was the sale of certain dairy products to the Eitel Restaurant in Chicago in 1947. (Exhibit 738). With respect to Beloit Dairy Company, therefore, the Government has not shown a right to relief under Section 2(a) of the Clayton Act. Beloit's motion to dismiss the complaint must therefore be granted in its entirety.

I turn next to the charges made against Bowman and Borden under Section 2(a). It is the opinion of the Court that the Government has shown that Bowman and Borden each has, in past years, discriminated among its purchasers. The evidence relevant to such discriminations is conflicting, and there is much material in the record which tends to show that Bowman and Borden each has some available affirmative defenses. However, at this stage of the case, the court cannot pass on the merits of those defenses. Ordinarily, then, this Court would hold that Bowman and Borden each has the burden of establishing that the alleged discriminations come within the score of certain statutory exceptions.

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There is one factor which compels this Court to hold that neither Bowman nor Borden need assume that
170 burden. That factor is the decree which was entered by another judge of this court in the case of *Dean Milk Co.* v. *American Processing and Sales Co., et al.*, 49 C 1159, on December 3, 1952. Bowman and Borden were both defendants in that case, and both are subject to the terms of that decree. Since Belmont is a subsidiary of Borden, and since Ridgeview is a subsidiary of Bowman, those two defendants are also subject to the terms of the Dean decree.

In the instant case, the Government has asked, in paragraph 10 of its prayer for relief:

> "That defendants, jointly and severally, be perpetually enjoined from, in any manner, offering or giving to any existing or prospective wholesale customer any preferential or discriminatory price, discount, rebate, lump sum cash payment, installment cash sum, interest free loan or other gratuity."

In Section VII of the Dean decree, Bowman and Borden, and their respective subsidiaries are perpetually enjoined from:

> "(a) except as permitted pursuant to the provisions of Paragraphs VII(e) or XI hereof, obtaining or attempting to obtain or to retain all or any part of the fluid milk business of any store customer by
> 171 means of:
>
> (1) any gift, payment or loan of any property of value made subsequent to December 1, 1952, exclusive of advertising media and including, but not limiting the generality of the foregoing, gifts, payments, loans or any offers of gifts, payments, loans of money, merchandise, fixtures, or equipment;
>
> (2) except on a proportionately equal basis, services or facilities or offers thereof;
>
> (3) extensions of credit beyond thirty (30) days;
>
> (4) arranging or facilitating or offering to arrange or to facilitate through accommodation endorsements, guaranties or other use of credit the obtaining or retaining of loans or credit from others;

(b) charging or offering to charge different store customers or prospective store customers different prices for fluid milk, except as permitted pursuant to the provisions of Paragraphs VII(e) or XI hereof;

172 (c) giving or paying or offering to give or to pay rebates, commissions, discounts, or allowances to different store customers or prospective store customers in connection with purchases of fluid milk, except as permitted pursuant to the provisions of Paragraphs VII(e) or XI hereof;

(d) giving or paying or offering to give or to pay a store customer, in connection with his purchases of fluid milk, rebates, commissions, discounts or allowances computed on the basis of a percentage of the out-of-store prices at which such fluid milk is sold.

(e) Nothing contained in this decree shall be construed to prevent a party to this decree from classifying its store customers on the basis of the volume of purchases by said customers and from giving to each such class of customers such price discounts as are justified by differences in the cost of selling and delivering to the said respective classes of customers, or as may be otherwise permitted by law; or from entering into or continuing in force and effect any contract giving effect to any such classification, or as
173 may be otherwise permitted by law."

Section XI, referred to at points throughout Section VII merely provides that: "Nothing contained herein shall be construed to prevent a party to this decree from meeting the competitive offers, practices, prices or discounts of competitors insofar as it is lawful so to do, or from collecting any monies or other property lawfully due now or hereafter from any customer."

Thus, the terms of Section VII of the Dean decree clearly enjoin Bowman, Borden, Ridgeview and Belmont from performing all acts which the Government has specified in paragraph 10 of its prayer for relief.

A decree of this court entered at the instance of a private litigant is as binding upon a defendant as a decree entered at the instance of the Government; and a consent decree, entered by any judge of this court without hearing evidence, is as binding as a decree entered by another judge after a protracted trial. I conclude, therefore, that each of the

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remaining defendants is now effectively enjoined by this court from performing any of the acts set forth in the Government's prayer for injunctive relief, insofar as the Clayton Act is concerned.

174 As a court of equity, I will not perform a useless task. The violations of the Clayton Act described in the complaint and shown at the trial are, for the most part, old violations. And to this court, the Dean decree assures, as completely as any decree can assure, that there will be no new violations.

For the foregoing reasons, the motions of defendants Bowman, Borden, Ridgeview, and Belmont to dismiss that part of the complaint which alleges violations of Section 2(a) of the Clayton Act must be granted.

I am convinced that this suit insofar as it charges Sherman Act violations should not have been filed. The Government began its investigation of this phase of the milk industry in Chicago in 1947, and has had six years to gather evidence in support of the charges in its complaint; yet this court now holds, as it must, that such evidence has not been gathered. I have deliberately reviewed the record in a manner most favorable to the Government, and have found its case to be utterly lacking in substance. The Government thought it necessary to subpoena counsel for the Dean Milk Company at an early stage of this trial, and sought the production of material he had prepared for the Dean litigation. This court then had to balance an

175 attorney's right to the privacy of his work product against the right of the Government to amass evidence for trial. This was an unpleasant dispute, and a dispute which should not have been presented to this court. It is also apparent that a portion of the Government's evidence was scraped together during the trial. Many of the Government's witnesses were contacted and interviewed after the trial had begun, and some of them offered no relevant testimony whatever during examination. These factors leave little room for doubt, at least in the mind of the Court, as to the quantum of evidence in the hands of the Government at the time this complaint was filed.

These observations raise important and troublesome questions. The calendar of this court has been and remains congested beyond belief; and antitrust litigation of this sort doubles the congestion. I recognize that I have an obligation to hear and to determine antitrust suits brought by the Government; I stated at another stage of these pro-

ceedings that I also recognize that Government antitrust suits should be expedited whenever possible. I recognize even more fully, however, and the Antitrust Division should recognize, that I have other compelling obligations to
176 other litigants. Indigent persons accused of crimes, plaintiffs who complaint of serious personal injuries, inmates of penal institutions who seek hearings on petitions of habeas corpus—all these and others also have a right to be heard, and to be heard quickly. Yet they must stand aside during long antitrust litigation. It is therefore imperative that some *responsible* agent of the Government appraise these protracted cases before they are brought into court. A lawyer's appraisal of the evidence in this case would have revealed the weakness I speak about today. Certainly, the Antitrust Division suspects wrongdoing in the milk industry; but a case cannot be built upon suspicions. As a court, I must ask for evidence; and the Antitrust Division should have substantial evidence, based upon its own investigations, before it comes to court. A careful appraisal of the Government's evidence should have been made by some person in the Antitrust Division long ago; and the obvious absence of such an appraisal casts serious and unpleasant reflections on the motives of the Antitrust Division in bringing this suit. Counsel for the defendants remarked some time ago that this litigation was nothing more than a fishing expedition, an expedition to glean evidence for the prosecution of
177 a companion criminal case pending before another judge of this Court. I feel compelled to comment that the remark has to some extent been justified by my review of this month's record.

These remarks are certainly not directed toward Government counsel who are assigned to the trial of this case. Each of Government counsel, under the fine direction of Mr. Jinkinson, has rendered an excellent performance. Government counsel were simply not supplied with the evidence necessary for success in this Court; but they performed splendidly with the little evidence they had.

For the reasons stated in this memorandum the motion of each defendant to dismiss the complaint is granted in its entirety, and, accordingly, the complaint is dismissed.

In accordance with the provisions of Rule 52(a), counsel for the defendants may prepare and file with the Court, in writing, within fifteen days from the date hereof, proposed findings of fact, conclusions of law, and a draft of a proposed order of dismissal, consistent with the views

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herein expressed, delivering copies thereof to counsel for the plaintiff. Within fifteen days of the receipt of such copies, counsel for the plaintiff may prepare and file
178 with the Court, in writing, their observations with reference thereto and suggestions for the modification thereof, delivering a copy of such observations and suggestions to counsel for the defendants. Within ten days thereafter, counsel for the defendants may present to the court, in writing, their reply to such observations and suggestions. Whereupon, the matter of making findings of fact, conclusions of law and order of dismissal herein will be taken by the court without further argument.

ENTER:

CAMPBELL
Judge

March 30, 1953

179 * * * * *

180 IN THE

UNITED STATES DISTRICT COURT

No. 51 C 947

UNITED STATES OF AMERICA,

Plaintiff,

— VS. —

THE BORDEN COMPANY, *et al.*,

Defendants.

Findings of Fact, Conclusions of Law, and Judgment—filed June 17, 1953

FINDINGS OF FACT.

1. This is an action brought by the United States of America on June 18, 1951, instituted under Section 4 of the Act of Congress of July 2, 1890, c. 647, 26 Stat. 209, as amended, entitled "An Act to Protect Trade and Commerce against unlawful Restraints and Monopolies," commonly known as the Sherman Act, and under Section 15 of the Act of Congress of October 15, 1914, c. 323, 38 Stat. 736, as amended, entitled "An Act to Supplement Existing Laws against Unlawful Restraints and

Monopolies and for other purposes," commonly known as the Clayton Act, for a decree (a) adjudging that the
181 defendants have violated Sections 1 and 2 of the Sherman Act, and Section 2(a) of the Clayton Act, as amended, (b) preventing and enjoining continuing violations by defendants of said sections of said acts, and (c) requiring defendants The Borden Company and Bowman Dairy Company to divest themselves of certain properties.

2. On September 14, 1940, the plaintiff filed a complaint in this court against Bowman Dairy Company, The Borden Company, Hunding Dairy Company, Capitol Dairy Company, Western United Dairy Company, certain other distributors of fluid milk in the Chicago area, and against certain other parties. The action was entitled *United States* v. *Borden et al.*, No. 2088. The plaintiff charged various violations of the Sherman Act in the purchase and distribution of fluid milk in the City of Chicago. On September 16, 1940, this court entered a decree against all defendants, upon the consent of all parties, but without any admission of guilt on the part of any defendant, enjoining numerous acts, including any agreement or conspiracy to refrain from competing for retail and wholesale customers. The instant cause is an independent processing, and not a supplementary proceeding to enforce, modify or vacate the aforesaid consent decree.

182 3. The following corporations are defendants in this cause:

(a) The Borden Company is a corporation organized and existing under the laws of the State of New Jersey, with offices and principal place of business in New York, New York. It is hereinafter referred to as "Borden."

(b) Bowman Dairy Company is a corporation organized and existing under the laws of the State of Illinois, with offices and principal place of business in Chicago, Illinois. It is hereinafter referred to as "Bowman."

(c) Belmont Dairy Company is a corporation organized and existing under the laws of the State of Illinois, with offices and principal place of business in Chicago, Illinois. It is a wholly owned subsidiary of Borden. It is hereinafter referred to as "Belmont."

(d) Ridgeview Farms Dairy, Inc. is a corporation organized and existing under the laws of the State of Illinois,

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with offices and principal place of business in Chicago, Illinois. It is a wholly owned subsidiary of Bowman. It is hereinafter referred to as "Ridgeview."

(e) Beloit Dairy Company is a corporation organized and existing under the laws of the State of Illinois,
183 with offices and principal place of business in Chicago, Illinois. It is hereinafter referred to as "Beloit."

(f) Capitol Dairy Company is a corporation organized and existing under the laws of the State of Illinois, with offices and principal place of business in Chicago, Illinois. It is hereinafter referred to as "Capitol."

(g) American Processing and Sales Company is a corporation organized and existing under the laws of the State of Illinois, with offices and principal place of business in Chicago, Illinois. Its name prior to some time in 1943 was Hawthorn-Mellody Farms Dairy, Inc. It is hereinafter referred to as "Hawthorn."

(h) Hunding Dairy Company is a corporation organized and existing under the laws of the State of Illinois, with offices and principal place of business in Chicago, Illinois. It is hereinafter referred to as "Hunding."

(i) Meadowmoor Dairies, Inc. is a corporation organized and existing under the laws of the State of Illinois, with offices and principal place of business in Chicago, Illinois. It is hereinafter referred to as "Meadowmoor."

184 (j) Western United Dairy Company is a corporation organized and existing under the laws of the State of Illinois, with offices and principal place of business in Chicago, Illinois. It is hereinafter referred to as "Western United."

4. Each of the defendants is engaged in the business of purchasing, processing, distributing, and selling fluid milk to wholesale customers and other purchasers in the Chicago area, defined herein to include the area lying within the corporate limits of the Cities of Chicago and Evanston and the villages of Wilmete, Kenilworth, Winnetka, Glencoe, and Oak Park, all in the State of Illinois.

5. The term "fluid milk", as used herein, shall refer to (a) those products which are reported as Class I milk to the Federal Milk Market Administrator under Market Order No. 41, as amended, and (b) fresh fluid cream, what-

ever the butterfat content, either sweet or sour, otherwise known as "table cream." This cream is reported to the Market Administrator as Class II milk.

6. Upon the plaintiff's motion, the court conducted pre-trial conferences beginning on February 12, 1953, and continuing daily thereafter until March 4, 1953. On this date the Court entered a pre-trial order, containing
185 numerous agreements of fact, agreements in respect to evidence, and agreements as to issues.

7. During the pre-trial conferences, defendants American Processing and Sales Company, Meadowmoor Dairies, Inc., Capitol Dairy Company, Western United Dairy Company, and Hunding Dairy Company reached agreement with plaintiff upon the terms of a consent decree. This decree was entered by the court on February 19, 1953, over the objections of the remaining defendants. The consenting defendants did not participate further in the pre-trial conferences nor appear at the trial of this cause.

8. Trial was begun on March 4, 1953. Defendants Bowman, Ridgeview, Borden, Belmont and Beloit appeared at the trial. The facts were tried by the court, sitting without a jury.

9. Plaintiff presented evidence from March 4, 1953 to March 23, 1953, on which date plaintiff rested. All testimony, except that of witness Charles C. Heinz, was given on the stand during the trial and in the presence of the court. The testimony of witness Heinz was taken in the form of a pre-trial deposition at which the court was not present.

186 10. On March 24, 1953, all defendants appearing at the trial made their several motions to dismiss, pursuant to Rule 41(b) of the Rules of Civil Procedure, and arguments on said motions were heard on March 24, 25, and 26, 1953. The court then took the motions under advisement and rendered an opinion on March 30, 1953, sustaining the motions.

11. Seven of plaintiff's witnesses were formerly employed by Borden or Bowman to solicit new wholesale accounts. They testified as to certain instructions given to them in the course of their employment, as to some practices current in the industry at the time of their employment, and as to conversations which they had or overheard during their employment. Each of these seven wit-

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nesses expressed some degree of animosity toward his former employer.

12. The testimony of these seven witnesses failed to reveal a single instance of communication between defendants which would be consistent with a conspiracy to monopolize the market defined in the complaint.

13. The testimony of these seven witnesses, viewed cumulatively, reveals one slight similarity between the actions of Bowman and Borden, insofar as one Borden solicitor and three Bowman solicitors testified that they were once instructed not to solicit wholesale accounts
187 then being served by certain defendant dairies. However, the instructions which these solicitors said they received are at variance with the terms of the conspiracy alleged in the complaint. For example, two solicitors testified that they could have solicited accounts then served by one of the defendants, while another solicitor testified to instructions not to solicit accounts served by a non-defendant.

14. Twenty-seven of plaintiff's witnesses owned food stores or restaurants in the Chicago area. Much of the testimony elicited from many of these witnesses is wholly irrelevant to any of the issues of this cause.

15. The relevant testimony of these twenty-seven witnesses failed to reveal any consistent pattern of business conduct among the defendants.

16. The relevant testimony of these twenty-seven witnesses revealed a continuous shuffling of customers between defendants and non-defendants, and between defendants.

17. Plaintiff's witness H. C. Eggleston is a former officer of and present stockholder in the Bowman Dairy Company. Plaintiff conducted a lengthy examination of Eggleston as an adverse witness, but uncovered details of only two instances of communication between Bowman and other defendants.

188 (a) The first communication concerned the formation of Ridgeview by Bowman. Some time in 1939, Eggleston attended a meeting of representatives of Chicago dairies, called to discuss mutual labor problems. Eggleston then informed two officers of Borden that Bowman was considering the formation of Ridgeview. The Borden repre-

sentatives told Eggleston that they too were considering the formation of a subsidiary. Eggleston and the Borden officers "understood" that Ridgeview would not be used to start a "price war" against Borden, but that Ridgeview and the Borden subsidiary would be used principally against non-union "vendor" competition.

(b) The second and final instance of communication between defendants, reported by Eggleston, concerns a meeting attended by Eggleston and Messrs. Peters and Lipsky of Hawthorn at the Lake Shore Club in Chicago. The three discussed a "price war" between Hawthorn and Ridgeview; the discussion lasted 30 or 40 minutes. Eggleston's testimony does not reveal that Bowman and Hawthorn reached any sort of agreement. His testimony reveals only that he informed Peters and Lipsky that "it is not our policy to start a price war."

18. Plaintiff's witness Heinz was manager of Bowman's Evanston branch in 1940 and 1941. He testified that
189 he had frequent meetings with one Kastner, who was then manager of Borden's Evanston branch. Portions of Heinz's testimony, if true, would tend to prove the existence of the conspiracy alleged in the complaint. However, Heinz's testimony is uncorroborated, and in many respects it is inconsistent with testimony adduced from witness Eggleston. Since Eggleston was, over all, a truthful witness, the court discounts the testimony of witness Heinz.

19. Plaintiff's witness Paul D. Newey, an attorney, testified concerning conversations he had in 1950 with solicitors of certain of the defendants. At the time of said conversations, Newey was employed by Thomas C. McConnell, attorney for the Dean Milk Company, to collect facts in support of the antitrust suit against certain of the defendants in this cause, referred to in Finding Number 37, *infra*. Newey represented himself to be a store customer of Dean Milk Company desirous of changing milk suppliers, and took tape recordings of the conversations by a concealed recording device.

20. At the trial, witness Newey was without any apparent present recollection of his conversations with the defendants' representatives. He used notes, assertedly to refresh his recollection, but his testimony appeared to be and was largely a paraphrase of these notes. These
190 notes were not his past recollection recorded, but were

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made by him shortly before his appearance on the stand from a reading of transcripts of the various tape recordings. One of these transcripts was also used to refresh his memory. The aforementioned notes were admittedly extracted from the transcripts of the tape recordings to suit plaintiff's convenience. The court completely disregards the testimony of witness Newey and holds that his testimony is valueless.

21. A major portion of plaintiff's documentary evidence consists of a series of minutes of meetings of the Sales Committee of the Bowman Dairy Company.

(a) The subject meetings occurred over a relatively short period of time and, more important, during a relatively early period. The earliest period which is evidenced by the minutes took place in March 1941; the latest in February 1943.

(b) Little of what is contained in the minutes represents positive policy or affirmative acts on the part of the Bowman Company; rather, most of the matter contained in the minutes represents informal, sometimes rambling discussion by Bowman officers concerned with a variety of phases of Bowman business.

191 (c) Some of the information contained in the minutes is an obvious parroting of gossip gleaned by Bowman employees and others.

22. The matter contained in the entire series of minutes introduced by the plaintiff, viewed cumulatively, does not tend to prove that Bowman or any other defendant conspired to monopolize sales of fluid milk to wholesale purchasers in the Chicago area. Indeed, much of the matter contained in the minutes is more consistent with competitive activity than with a conspiracy to monopolize.

23. The other documentary evidence introduced by plaintiff contains neither inter-company correspondence relating to a conspiracy, nor references to intercompany agreements or understandings of any sort.

24. Many of the documents introduced by plaintiff are wholly irrelevant to any of the issues of this cause.

25. Other documents introduced by plaintiff, seemingly consistent with an allocation of customers among the defendants, were explained credibly and rationally by plaintiff's witnesses at the trial. The explanations demonstrated

that these documents did not tend to prove a conspiracy to allocate customers.

192 26. The evidence adduced at the trial failed to show that defendants conspired to monopolize or did in fact monopolize sales of fluid milk to certain public institutions in the Chicago area.

27. The plaintiff established the occurrence of four incidents, each involving action taken by a defendant when a competitor bid for the fluid milk business at an institution then served by that defendant.

(a) Witness Albert Bello, who owned the Bello Dairy in Chicago Heights, Illinois, successfully bid for the milk requirements of the Oak Forest Infirmary, a county institution, in the second quarter of 1942. While the county was still indebted to him for milk supplied during that quarter, Messrs. Shankman and Fried of Capitol told him that the county would pay its debt only if he stopped bidding for the Infirmary business. Bello's testimony indicates that he subsequently refrained from bidding.

(b) Witness Hans Moser, who is vice-president of Lake Valley Farm Products, successfully bid for the business of the Municipal Tuberculosis Sanitarium. Mr. McGuire of Beloit threatened to solicit Lake Valley accounts if Moser continued to bid, and, according to Moser's testimony, McGuire did thereafter actively solicit Lake
193 Valley accounts. Witness McVeigh's testimony reveals a similar incident with reference to Beloit.

(c) Witness Patrick Cunningham, who is president of Cunningham Farms, was censured by a Bowman official for successfully bidding for the milk requirements of the County Hospital. Cunningham's testimony further indicates that after he successfully bid for the requirements of the Municipal Tuberculosis Sanitarium, Mr. McGuire of Beloit threatened to solicit Cunningham accounts. Beloit thereafter took the Home for Incurables, a large account, away from Cunningham.

28. With respect to each of the foregoing incidents, there is no evidence of threats of reprisals or reprisals by any defendant other than the defendant which had most frequently been serving the institution prior to the bid by the non-defendant milk distributor. Nor is there any evidence that the making of these threats of reprisals or reprisals by

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any particular defendant were known to any of the other defendants.

29. Plaintiff's Exhibits 1 through 11, inclusive, which are tabulations of bids made by both defendant and non-defendant milk distributors for the milk requirements of certain public institutions in the Chicago area for a period of
194 about ten years, demonstrate nothing more than a disposition on the part of certain defendant distributors to bid for the milk requirements of particular institutions.

30. The evidence introduced by plaintiff tends to prove that Bowman and Borden engaged in similar courses of conduct in one respect—each channelled its solicitation efforts toward new accounts, and toward accounts served by the Dean Milk Company.

31. The evidence introduced by plaintiff tends to show that Bowman and Borden each repeatedly lost accounts to the Dean Milk Company, and that each instructed its solicitors to attempt to recapture accounts lost to Dean. The evidence fails to show that Bowman and Borden acted in concert when they so instructed their solicitors. The court finds, on the basis of all the evidence introduced by plaintiff, that Bowman and Borden each acted reasonably under the circumstances.

32. All the evidence competent as to Borden and Belmont fails to establish the existence of a conspiracy, as alleged in the complaint, or the participation therein by Borden or Belmont.

33. All the evidence competent as to Bowman and Ridgeview fails to establish the existence of a conspiracy,
195 as alleged in the complaint, or the participation therein by Bowman or Ridgeview.

34. All the evidence competent as to Beloit fails to establish the existence of a conspiracy, as alleged in the complaint, or the participation therein by Beloit.

35. The plaintiff has offered competent and credible evidence of only one sale by Beloit to a wholesale customer; that was the sale of certain dairy products to the Eitel Restaurant in Chicago in 1947.

36. The plaintiff has offered evidence tending to prove that defendants Borden, Bowman, Ridgeview, and Belmont have sold fluid milk for resale in interstate trade and commerce to different wholesale purchasers in the Chicago area

at prices which discriminate between said purchasers of fluid milk of like grade and quality. These discriminations in price have been granted in the form of preferential prices, discounts, rebates, lump-sum cash payments, and various other forms.

37. Section VII of the decree in the case of *Dean Milk Company* v. *American Processing and Sales Company et al.*, 49 C 1159, entered by this court on December 3, 1952, subsequent to the price discriminations referred to in
196 Finding No. 36, supra, perpetually enjoins Bowman and Borden, and their respective subsidiaries, Ridgeview and Belmont, from:

"(a) except as permitted pursuant to the provisions of Paragraphs VII(e) or XI hereof, obtaining or attempting to obtain or to retain all or any part of the fluid milk business of any store customer by means of:

(1) any gift, payment or loan of any property of value made subsequent to December 1, 1952, exclusive of advertising media and including, but not limiting the generality of the foregoing, gifts, payments, loans or any offers of gifts, payments, loans of money, merchandise, fixtures, or equipment;

(2) except on a proportionately equal basis, services or facilities or offers thereof;

(3) extensions of credit beyond thirty (30) days;

(4) arranging or facilitating or offering to arrange
197 or to facilitate through accommodation endorsements, guaranties or other use of credit the obtaining or retaining of loans or credit from others;

"(b) charging or offering to charge different store customers or prospective store customers different prices for fluid milk, except as permitted pursuant to the provisions of Paragraphs VII(e) or XI hereof;

"(c) giving or paying or offering to give or to pay rebates, commissions, discounts, or allowances to different store customers or prospective store customers in connection with purchases of fluid milk,

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except as permitted pursuant to the provisions of Paragraphs XII(e) or XI hereof;

"(d) giving or paying or offering to give or to pay a store customer, in connection with his purchases of fluid milk, rebates, commissions, discounts or allowances computed on the basis of a percentage of the out-of-store prices at which such fluid milk is sold;

"(e) Nothing contained in this decree shall be construed to prevent a party to this decree from
198 classifying its store customers on the basis of the volume of purchases by said customers and from giving to each such class of customers such price discounts as are justified by differences in the cost of selling and delivering to the said respective classes of customers, or as may be otherwise permitted by law; or from entering into or continuing in force and effect any contract giving effect to any such classification, or as may be otherwise permitted by law."

Section XI of the decree, referred to at points throughout Section VII, provides that: "Nothing contained herein shall be construed to prevent a party to this decree from meeting the competitive offers, practices, prices, or discounts of competitors insofar as it is lawful so to do, or from collecting any monies or other property lawfully due now or hereafter from any customer."

38. Insofar as Section 3(a) of the Clayton Act, is concerned, Bowman, Borden, Ridgeview, and Belmont are effectively enjoined by Section VII of the Dean decree from performing any of the acts set forth in the plaintiff's prayer for injunctive relief.

199 *Conclusions of Law*

1. Under Rule 41(b) of the Rules of Civil Procedure, this court, as trier of fact, is under an affirmative duty to review all the evidence presented by plaintiff, and, upon the basis of that review, to determine whether or not the evidence warrants the relief sought in the complaint.

2. In a suit of this nature and scope, the plaintiff must be afforded any opportunity, within reason, to support the charges in its complaint. Conspiracies of the sort described in the complaint are difficult to prove, and most often can be proved only through the use of evidence which is circumstantial and seemingly remote. The court has therefore

admitted and considered any evidence which might in some manner tend to prove the existence of a conspiracy.

3. The burden of proof is on the plaintiff to establish, by the preponderance of evidence, the existence of the alleged conspiracy among defendants to restrain and monopolize trade in the sale of fluid milk in interstate trade and commerce to wholesale customers and public institutions in the Chicago area.

4. Plaintiff has failed to offer direct evidence of any unlawful agreement or understanding among the defendants.

200 5. An unlawful conspiracy may be formed without simultaneous agreement on the part of the conspirators. Acceptance by competitors, without previous agreement, of an invitation to participate in a plan, the necessary consequences of which, if carried out, is restraint of interstate commerce, is sufficient to establish an unlawful conspiracy under the Sherman Act.

6. Plaintiff has demonstrated that some of the defendants have acted similarly in certain respects, and, on the basis of such similar actions, plaintiff asks the court to infer an unlawful agreement. However, the record demonstrates that each defendant was confronted with similar problems, and that each arrived at reasonable solutions to those problems. The plaintiff has failed to prove, by a preponderance of the credible evidence, that defendants acted in concert.

7. Plaintiff has failed to prove that defendants violated Sections 1 or 2 of the Sherman Act.

8. In order to establish an unlawful discrimination in price under Section 2(a) of the Clayton Act, as amended, the plaintiff must prove the occurrence of at least two sales. Therefore, with respect to Beloit, the plaintiff has not shown a right to relief under Section 2(a) of the Clayton Act.

9. Bowman, Borden, Ridgeview, and Belmont are
201 now effectively enjoined by the terms of the Dean decree from performing acts in violation of Section 2(a) of the Clayton Act, as amended. A decree of this court entered at the instance of a private litigant is as binding upon a defendant as a decree entered at the instance of the government; and a consent decree, entered by any

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judge of this court without hearing evidence, is as binding as a decree entered by another judge after a protracted trial. Since the violations of the Clayton Act described in the complaint and shown at the trial are, for the most part, old violations, and since the Dean decree assures that there will be no new violations, this court shall not grant the injunctive relief sought by plaintiff under Section 2(a) of the Clayton Act.

Judgment

Defendants The Borden Company, Bowman Dairy Company, Belmont Dairy Company, Ridgeview Farms Dairy, Inc., and Beloit Dairy Company having filed motions to dismiss at the close of plaintiff's evidence in accordance with Rule 41(b) of the Rules of Civil Procedure, and the court having entered Findings of Fact and Conclu-
202 sions of Law, in accordance with Rule 52(a), therefore:

It is hereby ordered, adjudged and decreed:

1. That the motions to dismiss be and are hereby granted;
2. That the complaint be and is hereby dismissed as against said defendants;
3. That judgment on the merits be and is hereby entered against the plaintiff and in favor of said defendants.

ENTER:

CAMPBELL
United States District Judge

June 17, 1953.

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203 * * * * *

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204 [FILE ENDORSEMENT OMITTED]

IN

UNITED STATES DISTRICT COURT

[TITLE OMITTED]

Motion of Defendants Bowman and Ridgeview Pursuant to Rule 52(b) of the Federal Rules of Civil Procedure to Amend Certain Findings of Fact Heretofore Entered—filed June 29, 1953

Defendants BOWMAN and RIDGEVIEW, by their attorneys, move the Court pursuant to Rule 52(b) of the Federal

Rules of Civil Procedure to amend the Findings of Fact and Conclusions of Law entered herein on June 17, 1953, as follows:

1. Finding 36: Insert the word "store" in the fourth line of said finding immediately preceding the word "wholesale", so that the finding will read as follows:

> "36. The plaintiff has offered evidence tending to prove that defendants Borden, Bowman, Ridgeview, and Belmont have sold fluid milk for resale in interstate trade and commerce to different store wholesale purchasers in the Chicago area at prices which discriminate between said purchasers of fluid milk of like grade and quality. These discriminations in price have been granted in the form of preferential prices, discounts, rebates, lump-sum cash payments, and various other forms."

2. Finding 38: Amend Finding 38 to read as follows:

"There is no substantial credible evidence tending
205 to prove that either Bowman, Ridgeview, Borden, or Belmont has in the past five years performed any act violative of Section 2(a) of the Clayton Act, as amended, which is not now prohibited by the decree entered in *Dean Milk Co.* v. *American Processing and Sales Company, et al.*, referred to in Finding 37."

3. Add an additional conclusion of law reading as follows:

> "Before exercizing its power to grant injunctive relief, the Court must determine that there exists some cognizable danger of recurrent violations of law. Proof of past violations of the Clayton Act is not in itself sufficient to warrant the granting of injunctive relief if there is no significant threat of future violation."

In support of the foregoing motion, defendants show:

1. The evidence tending to prove that the defendants discriminated among their wholesale purchasers related almost entirely to store customers. The government, recognizing this fact, did not question the accuracy of Paragraphs 5 and 6 of Part VII of defendants' proposed findings. Finding 36 in its present form is therefore broader than is justified by the evidence; it should be amended in order to avoid any technical basis for objection to defendants' suggested revision of Finding 38.

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2. For three reasons, the defendants respectfully suggest that it would be appropriate to modify Finding 38 in accordance with this motion. First, it is possible that Finding 38, unless amended, may afford the plaintiff a technical basis for claiming error. The prayer for relief in the plaintiff's complaint applies to all wholesale customers, including hotels and restaurants as well as store customers. The *Dean* decree applies only to store customers. There-
206 fore, it is not strictly accurate to find that the *Dean* decree enjoins all of the acts set forth in the plaintiff's prayer for relief. The suggested substitute for Finding 38 avoids this technical basis for objection, and yet is adequate to sustain the Court's judgment, since the evidence does not disclose discriminations with respect to hotels and restaurants. Second, it should be noted that the proposed amended Finding 38 is taken from Paragraph 20 of Part VII of defendants' proposed Findings. The Government made no objection to this proposed finding when it was previously submitted to the Court. Third, the proposed substitute finding also points out that the discriminations disclosed by the evidence are for the most part old discriminations. It is appropriate to include a basis in the findings for the reference in the last sentence of Conclusion of Law No. 9 to the fact that the evidence relates for the most part to old violations. This portion of the conclusion is not otherwise directly supported by the findings.

3. The proposed additional conclusion of law is based on the opinion of the United States Supreme Court in *United States* v. *W. T. Grant & Co.*, No. 532 O.T. 1952, decided on May 25, 1953. Since this case was decided after the plaintiff and defendants had submitted all of their observations and suggestions with respect to findings of fact and conclusions of law, and since it directly supports this Court's disposition of the portion of the case based on Section 2(a) of the Clayton Act, it seems appropriate to amend the conclusions of law to reflect this recent pronouncement by the Supreme Court.

The proposed additional conclusion of law is directly supported by the following portions of the opinion in that case:

"Along with its power to hear the case, the court's power to grant injunctive relief survives discontinu-
207 ance of the illegal conduct. *Hecht* v. *Bowles*, supra; *Goshen Mfg. Co.* v. *Myers Mfg. Co.*, 242 U. S. 202

(1916). The purpose of an injunction is to prevent future violations, *Swift & Co.* v. *United States*, 276 U. S. 311, 326 (1928) and, of course, it can be utilized even without a showing of past wrongs. But the moving party must satisfy the court that relief is needed. The necessary determination is that there exists some cognizable danger of recurrent violation, something more than the mere possibility which serves to keep the case alive. The chancellor's decision is based on all the circumstances; his discretion is necessarily broad and a strong showing of abuse must be made to reverse it. To be considered are the bona fides of the expressed intent to comply, the effectiveness of the discontinuance and, in some cases, the character of the past violations."

* * * * *

"'The aforesaid violation(s),' the specific interlocks, had been voluntarily terminated and intention to resume them had been negatived under oath. As to the prayer that the defendants be enjoined from any future violations of § 8, the complaint alleged no threatened violations other than those specifically charged. In these circumstances, the District Judge could decide that there was no significant threat of future violation and that there was no factual dispute about the existence of such a threat."

Respectfully submitted,

L. Edward Hart, Jr.
L. Edward Hart, Jr.

Ernest J. London
Ernest J. London
Attorneys for Bowman Dairy Co. and Ridgeview Farms Dairy, Inc. Defendants

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9 [FILE ENDORSEMENT OMITTED]

IN

UNITED STATES DISTRICT COURT

[TITLE OMITTED]

Motion for New Trial—filed June 26, 1953

The plaintiff moves the Court for an order that the judgent entered in this action on June 17, 1953 be set aside d a new trial granted herein or in the alternative said dgment be opened, additional testimony taken, the findgs of fact and conclusions of law amended, and a new dgment entered on the following grounds:

1. That the Court erred in refusing to permit plaintiff use the deposition of the witness Hezekiah C. Eggleston, ken on March 23, 1951 in the case of *Dean Milk Comny* v. *American Processing & Sales Company, et al.*, . 49 C 1159, for the purpose of impeaching the witness ggleston during his testimony in the trial of this case. ie Court ruled that the deposition was under seal and t available to plaintiff.

At the trial, on March 6, 1953, plaintiff offered to use is deposition to impeach the witness Eggleston, who was en testifying. The deposition was at that time unsealed d had been properly withdrawn from the office of the erk of the Court on March 5, 1953 by plaintiff, as evinced by the receipt to the Clerk of the Court, a photoated copy of which is attached hereto and marked Exbit 1. Plaintiff withdrew the deposition under the aority of an order of another judge of this court, a ceried copy of which is attached hereto and marked Exhibit 2.

0 This deposition had been regularly unsealed on March 5, 1953 upon the request of a party in the *ean Milk Company* case, pursuant to Rule 14 of the Rules this court, as stated in the verified answer of attorney homas C. McConnell filed in response to defendants' mon to reseal said depositions, a certified copy of which is tached hereto and marked Exhibit 3. Defendants' motion reseal the aforesaid depositions in the *Dean Milk Comny* case was heard before another judge of this court on pril 10, 1953 and on April 16, 1953 the court entered an der holding that said depositions were properly and gally unsealed on March 5, 1953, copy of said order being tached hereto and marked Exhibit 4.

Because the testimony of another witness, Heinz, was inconsistent with Eggleston's, the Court discounted the testimony of Heinz. The Court found that Heinz's testimony, if credited, tended to prove the existence of the conspiracy alleged in the complaint.

2. That the witness Hezekiah C. Eggleston testified falsely to material facts concerning his participation, as Sales Manager and Vice-President of the Bowman Dairy Company, in the conspiracy charged in the complaint. Exhibits 5 and 6 attached hereto and Appendix I to plaintiff's Brief in Support of this motion relate to some contradictions between the testimony of the witness Eggleston at this trial and statements made by Eggleston on former occasions.

3. That the Court erred in refusing to allow plaintiff to play in open court recordings of interviews between the witness Paul D. Newey and various representatives of defendants. These interviews contained many admissions by agents of the defendants relating to the issue of conspiracy which was decisive in this case. Plaintiff offered these tape recordings at the trial on March 19, 1953 by requesting the Court's permission to set up a suitable electronic device to play them in open court, as stated in the affidavit of Earl A. Jinkinson which is attached hereto and marked Exhibit 7. Permission was denied.

The Court chose to receive this evidence not from a hearing of the recordings themselves but through the oral testimony of the witness Newey, who had participated in the interviews while recording them. The testimony was so received in the record. Later, in its Memorandum
211 and Opinion the Court entirely discredited the testimony of the witness Newey and stated that it disregarded this testimony in deciding the case, on the ground that it consisted of conclusions by Newey extracted from the transcripts of the recordings. Having rejected the testimony which was received in the manner chosen by the Court, the Court should permit plaintiff to use the best evidence, the recordings themselves, which plaintiff had offered at the trial, to prove the decisive issue of conspiracy in this case.

4. That the Court erred in excluding the offered testimony of the witnesses Eggleston and Moser relating to conversations between these witnesses and deceased employees and officers of defendants relating to the fact of

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conspiracy charged in the complaint, the decisive issue in this case.

5. That the Court erred in limiting plaintiff's proof to the period subsequent to 1940 when testimony of witnesses Heinz, Eggleston, and others was offered for the purpose of showing that the origins of the present conspiracy antedated the year 1940.

6. That the Court erred in holding that defendants Bowman and Borden should not be required to present their defenses to the violations of Section 2(a) of the Clayton Act, which the Court found were shown by plaintiff, on the ground that the decree which was entered by another judge of this court in the case of *Dean Milk Company* v. *American Processing & Sales Company, et al.*, 48 C 1159, on December 3, 1952, enjoins these defendants from performing future violations of Section 2(a) of the Clayton Act.

7. Because of the scope and importance of this motion, plaintiff moves that a date be fixed to hear oral arguments of counsel and that notice of the time, place and date of such oral arguments be given within a reasonable time prior thereto.

WHEREFORE, upon the grounds and for the reasons stated herein, and in the brief filed herewith in support of this motion and the Appendix thereto, the plaintiff respectfully prays for an order of this Court setting aside
212 the judgment herein and awarding a new trial to plaintiff or in the alternative to open said judgment and take additional testimony in said cause and for oral arguments on this motion.

EARL A. JINKINSON
Earl A. Jinkinson
Special Assistant to the Attorney General

THOMAS M. KERR JR.
Thomas M. Kerr, Jr.

THOMAS M. ROTHWELL
Thomas M. Rothwell

Trial Attorneys

Room 400, United States Courthouse
Chicago 4, Illinois
HArrison 7-4700

Dated: June 26, 1953

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Exhibit 1 to Motion

UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF ILLINOIS

No. 49-C-1159

IN RE

DEAN MILK VS. AMERICAN PROCESSING

Received Depositions of:

(1) William Horton (2) Hezekiah Eggleston (3) Raymond A. Hopfer (4) Herbert W. Horton (5) Walter F. Kettell (6) Melvin H. Karnkamp (7) Adolph E. Moller (8) Frank Joseph Kost (9) Arthur C. Ekberg (10) Raymond F. Schroeder (11) David Cameron Peck (12) Niels G. Corydon

Date 3-5-53

Name Harry H. Faris

Address Room 400—U.S. Courthouse

Telephone HA 7-4700 (Ext. 30)

NOTICE

No part of the contents of any file is to be removed from the Clerk's office, except by leave of Court.

ROY H. JOHNSON,
Clerk

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Exhibit 2 to Motion

UNITED STATES DISTRICT COURT

FOR THE NORTHERN DISTRICT OF ILLINOIS

EASTERN DIVISION

Present: HONORABLE MICHAEL L. IGOE, *District Judge*

Cause No.: 49 C 1159

DEAN MILK COMPANY

— VS. —

AMERICAN PROCESSING & SALES CO., INC., ET AL.

ORDER

On motion of Mr. Ralph M. McCareins, Attorney for defendant United States of America, it is

ORDERED that leave be and hereby is given the said Mr. Ralph M. McCareins to withdraw, for five days, the depositions of witnesses Albert Bello, William Horton, Charles C. Heinz, Hezekiah Eggleston, Raymond A. Hofer, Herbert W. Horton, Walter F. Kittell, Melvin H. Kernkamp, Adolph E. Moller, Frank Joseph Kost, Arthur C. Ekberg, Raymond F. Schroeder, David Cameron Peck and Niels G. Corydon.

I, ROY H. JOHNSON, Clerk of the United States District Court for the Northern District of Illinois, do hereby certify the above and foregoing to be a true and correct copy of an order made and entered in said Court on the 23rd day of January, A.D. 1953 as fully as the same appears of record in my office.

IN TESTIMONY WHEREOF, I have hereunto set my hand and affixed the Seal of said Court at my office in Chicago, in said District, this 8th day of May, A.D. 1953.

ROY H. JOHNSON
CLERK

By: ELEANOR B. DAVIS
Deputy Clerk

Exhibit 3 to Motion

UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF ILLINOIS

EASTERN DIVISION

Civil Action No. 49 C 1159

DEAN MILK COMPANY, a corporation

Plaintiff,

—v.—

AMERICAN PROCESSING AND SALES COMPANY, INC., a Corporation, et al.,

Defendants.

ANSWER TO DEFENDANTS' MOTION

Now comes the DEAN MILK COMPANY, by THOMAS C. MCCONNELL and HEALY AND STICKLER, its attorneys, and by way of Answer to the Motion of defendants, Bowman Dairy Company and The Borden Company, says:

1. Admits the allegations in paragraph 1 of the motion.

2. Admits that notice of the motion was served upon Thomas C. McConnell, but says that said McConnell did not appear in court in response to the same.

3. Admits that a colloquy took place as set forth in Exhibit A attached to the motion.

4. Admits that on the 10th day of February, 1953, this court rendered an opinion but says that the said McConnell was in Tucson, Arizona, and did not return to the city of Chicago until March 4, 1953.

5. Admits the allegations contained in paragraph 5.

6. Says that on the afternoon of March 5, 1953, Thomas C. McConnell, as the attorney for the Dean Milk Company directed the opening of the depositions in this case; that the circumstances surrounding such action were as follows:

216 That on Thursday, March 5, 1953, the said McConnell was advised by attorneys from the Antitrust Division of the Department of Justice that one H. G.

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Eggleston had advised them that he, Eggleston, intended to repudiate sworn statements contained in a deposition filed in this cause and that an attack was to be made by said witness on the character and integrity of the attorney for the Dean Milk Company and of the Dean Milk Company; and that such attacks could not be rebutted or met unless the said deposition was released from the seal by direction to the clerk of this court. That thereupon the said McConnell advised and conferred with associate counsel in the case who had been present at the proceedings before this court and was advised that there was nothing in the order of the court or the proceedings before this court which was intended or had the effect of preventing any party to this cause or its attorney from directing the clerk of this court to open the seals of said depositions in order to protect a party to this cause from an unconscionable attack upon the character and integrity of the party to the cause or an attorney representing such party. That Rule 16 of this court provides:

> "Unless otherwise ordered by this court, the clerk shall, upon request of a party or his attorney open any deposition filed in this court, first endorsing on the back thereof at the time of opening the name of the party or attorney at whose instance the deposition is opened."

That shortly after 3:00 P.M. on the afternoon of March 5, 1953, the said McConnell called by telephone Samuel E. Dean, Chairman of the Board of the Dean Milk Company and related to said Dean the information he, McConnell, had received, and was thereupon expressly authorized to direct the seal of the depositions to be opened. That present with said Samuel E. Dean was Howard Dean, president of the Dean Milk Company, who likewise at the time of said telephone conversation authorized the opening of
217 said depositions; that said action was not, in the opinion of any of the counsel for the Dean Milk Company, in derogation of any order of this court in that the only order entered herein was against the United States Government, not a party to the cause, and in that the remarks of this court show that it did not intend to prevent a party to the cause from making use of evidence taken in this case to refute false and unwarranted charges wherever made; that such action was not contemptuous of this court but in complete accord with the rules thereof and for the purpose that the untruth of the various charges made by the various defendants might be shown of record.

7. Respondent has no information as to the allegations of paragraph 7 of the motion, and therefore cannot answer the same.

8. Admits that Thomas C. McConnell testified in a proceeding before the Hon. William J. Campbell, Judge of this Court; that he directed that "this deposition be open on my client's permission" but denies that the transcript attached to the motion as Exhibit D is accurate.

9. Denies that Samuel E. Dean, Jr. stated to F. H. Kullman, Jr. that he had not authorized Mr. Thomas C. McConnell to release the seals of depositions on file, but says that the said Dean was referring only to tape recordings in McConnell's office by his reference to "that material"; that at the time of said conversation with F. H. Kullman, Jr., the said Dean had authorized the said McConnell to direct that said deposition be unsealed on, to-wit, shortly after 3:00 P.M. on March 5, 1953, and before the said McConnell had directed the clerk of this court to take such action.

WHEREFORE, respondent asks that said motion be denied.

THOMAS C. McCONNELL
HEALY & STICKLER

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218 STATE OF ILLINOIS
COUNTY OF COOK, *ss.*

THOMAS C. McCONNELL, being first duly sworn on oath deposes and says that he has read the above and foregoing Answer by him subscribed and that the facts therein stated are true.

THOMAS C. McCONNELL

Subscribed and sworn to before
me this 10th day of March, 1953.

FRANCES WATTS
Notary Public

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219 STATE OF ILLINOIS
COUNTY OF COOK, *ss.*

HOWARD E. DEAN, being first duly sworn, on oath deposes and says that he has read that part of the above and foregoing Answer which pertains to a certain telephone conversation between Thomas C. McConnell and Samuel E. Dean on March 5, 1953, at approximately 3:00 P.M., and the further statements in the above and foregoing Answer

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to the effect that affiant was present with said Samuel E. Dean at the time of said conversation, and that affiant as President of the Dean Milk Company, during the course of said conversation, expressly authorized said Thomas C. McConnell as attorney for the Dean Milk Company to direct the opening of the depositions in the above entitled cause, and affiant states that said allegations in said answer are true as therein recited.

HOWARD M. DEAN

Subscribed and sworn to before me this 10th day of March, 1953.

FRANCES WATTS
Notary Public

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Exhibit 4 to Motion

IN THE

DISTRICT COURT OF THE UNITED STATES

FOR THE NORTHERN DISTRICT OF ILLINOIS

EASTERN DIVISION

No. 49 C 1159

DEAN MILK COMPANY,

Plaintiff,

— VS. —

AMERICAN PROCESSING AND SALES COMPANY, INC., et al.,

Defendants.

ORDER

THIS MATTER COMING ON TO BE HEARD on the motion of defendants BOWMAN DAIRY COMPANY and THE BORDEN COMPANY to reseal certain depositions on file in this cause, and the Court having heard the arguments of counsel and being fully advised in the premises,

DOES HEREBY FIND:

1. That the action of plaintiff's counsel in unsealing depositions in this cause pursuant to Rule 14 of this Court was justified.

2. That in view of the charge of plaintiff's counsel that the witness H. C. Eggleston testified in another cause on material facts in conflict with his deposition on file in this cause, it would not be in the interest of justice to reseal the Eggleston deposition until an investigation has been made of the facts and circumstances concerning such alleged conflict by the Department of Justice of the United States.

221 IT IS THEREFORE ORDERED, ADJUDGED AND DECREED that the motion to reseal the depositions be and the same is hereby denied as to the deposition of H. C. Eggleston, and that said motion be allowed as to all other depositions.

IT IS FURTHER ORDERED, ADJUDGED AND DECREED that all depositions, exclusive of the Eggleston deposition, be and they are hereby ordered resealed and the parties and attorneys are directed not to unseal the same until the further order of this Court.

Entered:

IGOE
Judge.

Dated: April 16, 1953

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222 IN THE

UNITED STATES DISTRICT COURT

FOR THE NORTHERN DISTRICT OF ILLINOIS

EASTERN DIVISION

No. 49 C 1159

I, ROY H. JOHNSON, Clerk of the United States District Court for the Northern District of Illinois, do hereby certify the above and foregoing to be a true and correct copy of an order made and entered in said Court on the 16th day of April, A.D. 1953 as fully as the same appears of record in my office.

IN TESTMONY WHEREOF, I have hereunto set my hand and affixed the seal of said Court at my office in Chicago, in said District, this 8th day of May, A.D. 1953.

ROY H. JOHNSON
Clerk

By ELEANOR B. DAVIS
Deputy Clerk

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Exhibit 5 to Motion

UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF ILLINOIS

EASTERN DIVISION

Civil Action No. 51 C 947

UNITED STATES OF AMERICA,

Plaintiff,

— v. —

THE BORDEN COMPANY ET AL.,

Defendants.

STATE OF ILLINOIS
COUNTY OF COOK, *ss.*

I, PAUL V. FORD, being first duly sworn, on oath do depose and state that I am an attorney at law employed by the Antitrust Division, Department of Justice.

Affiant further states that on the afternoon of June 10, 1948 one Hezekiah C. Eggleston came to the offices of the Antitrust Division, 208 South LaSalle Street, Chicago, Illinois, and was interviewed by affiant. Also present at this interview were Edward Neafsey, Special Agent of the Federal Bureau of Investigation, and George E. Leonard, Jr., an attorney employed by the Antitrust Division. Immediately following this interview I dictated a detailed memorandum concerning the aforesaid interview with Eggleston and I have refreshed my recollection from said memorandum prior to making this affidavit.

During the course of the interview on June 10, 1948, Hezekiah C. Eggleston made the following statements:

1. That the large Chicago dairies, exclusive of Dean, Wanzer, and Hunding, have for years past refrained from taking each other's store and bulk customers.

2. As part of the agreement to refrain from taking each other's customers, the large dairies have traded customers who had become dissatisfied with the company serving them; and that on such occasions the dairy taking the dissatisfied customer would notify the other dairy prior to serving that customer.

224 On the afternoon of June 24, 1948 the same Hezekiah C. Eggleston came to the offices of the Antitrust Division, located at the above-described address, and was interviewed by affiant. Present at this interview also were George E. Leonard, Jr. and Harry Faris, attorneys employed by the Antitrust Division. Immediately following this interview I dictated a detailed memorandum concerning the interview and I have refreshed my recollection from said memorandum prior to making this affidavit.

During the course of the interview on June 24, 1948, Hezekiah C. Eggleston made the following statements:

1. That Bowman and Borden, together with other dairies, agreed that they would not buy customers from one another; the same dairies agreed that they would confine their buying to customers of Dean, Wanzer and smaller dairies not parties to the agreement.

2. That Bowman organized and operated Ridgeview as a fighting company for the express purpose of combating certain competition only and had never intended that Ridgeview should make a profit for Bowman.

On January 11, 1951 the same Hezekiah C. Eggleston was interviewed by E. Houston Harsha, an attorney employed by the Antitrust Division, and affiant at 2701 North Pulaski Road, Chicago. The day following this interview I dictated a detailed memorandum concerning the interview and I have refreshed my recollection from said memorandum prior to making this affidavit.

During the course of the interview on January 11, 1951, Hezekiah C. Eggleston made the following statements:

1. That Westbrook Farms had been purchased by the Bowman Company for an amount far in excess of its real value; that it was worth about $60,000.00; that Bowman paid about $240,000.00. That the excessive price was paid by the Bowman Company because of the nuisance value of the Westbrook Farms and for the purpose of removing this company as a competitor to Bowman.

225 2. That after Bowman acquired Westbrook, Capitol Dairy asserted that under traditional policy Cook County Hospital belonged to Capitol; that Bow-

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man maintained that, by right of succession, Bowman was entitled to the account; that Walter Kettell of Bowman told Eggleston that Kettell adjusted the matter with Capitol by alternating the account between Capitol and Bowman.

PAUL V. FORD
Paul V. Ford

Subscribed and sworn to before me by the said Paul V. Ford this 25th day of June 1953.

KATHRYN M. REILLY
Notary Public within and for the County of Cook, State of Illinois
My commission expires March 23, 1957.

(Seal)

226

Exhibit 6 to Motion

UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF ILLINOIS

EASTERN DIVISION

Civil Action No. 51 C 947

UNITED STATES OF AMERICA,

Plaintiff,

— v. —

THE BORDEN COMPANY ET AL.,

Defendants.

AFFIDAVIT

STATE OF ILLINOIS
COUNTY OF COOK, *ss.*

I, HARRY H. FARIS, being first duly sworn on oath, do depose and state that I am an attorney at law employed by the Antitrust Division, Department of Justice.

On the afternoon of May 1, 1951 one Hezekiah C. Eggleston came to the offices of the Antitrust Division, 208 South

LaSalle Street, Chicago, Illinois, and was interviewed by E. Houston Harsha, an attorney at law employed by the Antitrust Division, and affiant. I have refreshed my recollection from a memorandum made of the interview prior to making this affidavit.

During the course of the interview on May 1, 1951, Hezekiah C. Eggleston made the following statements:

1. That for many years there had been an agreement, originating in 1932 or 1933, among Bowman, Borden, Western United, Capitol, Hunding, and Wanzer not to solicit each other's customers.

2. That Bowman largely disregarded the 1940 Consent Decree and so also did Borden; that the Consent Decree did not affect the general understanding not to solicit each other's accounts.

3. That (when asked about the April 29, 1941 and May 20, 1941 Sales Committee meeting minutes) he
227 met with Koenig and Baril of the Borden Company shortly after May 20, 1941 and they discussed the low Borden milk prices in the Evanston area and made an adjustment of the prices.

4. That in 1940 and 1941 Hezekiah C. Eggleston had rigged bids with Koenig of the Borden Company for milk for Fort Sheridan and Great Lakes; that about 1941 Koenig told Eggleston they should let subordinates handle the bidding for Fort Sheridan and Great Lakes; that Eggleston designated Larson of Bowman and told Larson to call Kastner of Borden and that Kastner would tell Larson what Borden was going to bid; that Larson followed Eggleston's instruction and subsequently reported orally to Eggleston on the result of Larson's calls to Borden.

5. That Kettell of Bowman and Inglehart of Borden discussed the bids for milk to be submitted to Hines Veterans Hospital.

6. That Bowman and Borden had an agreement about which dairy would serve Navy Pier and that the agreement was worked out during the war; that the Navy Pier agreement was handled by Kettell of Bowman and Inglehart of Borden.

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Further affiant saith not.

HARRY H. FARIS
Harry H. Faris

Subscribed and sworn to before me by the said Harry H. Faris this 25th day of June 1953.

KATHRYN M. REILLY
Notary Public within and for the County of Cook, State of Illinois.
My commission expires March 23, 1957.

(Seal)

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Exhibit 7 to Motion

UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF ILLINOIS

EASTERN DIVISION

Civil Action No. 51 C 947

UNITED STATES OF AMERICA,

Plaintiff,

— v. —

THE BORDEN COMPANY ET AL.,

Defendants.

AFFIDAVIT

STATE OF ILLINOIS
COUNTY OF COOK, *ss.*

I, Earl A. Jinkinson, being first duly sworn on oath do depose and state that I am a duly appointed attorney in the Antitrust Division of the Department of Justice, that I assisted, as counsel for the plaintiff, in the trial of *United States* v. *The Borden Company et al.*, Civil No. 51 C 947, in the United States District Court for the Northern District of Illinois.

Affiant further states that during the course of said trial I caused a supoena *duces tecum* to be served on Thomas C. McConnell, a practicing attorney at 134 North LaSalle Street, Chicago, Illinois, requesting the production of cer-

tain tape recordings made at the direction of Thomas C. McConnell during his investigation and preparation for trial of *Dean Milk Company* v. *American Processing and Sales Co., et al.*, No. 49 C 1159, by Paul D. Newey, an attorney at law employed by McConnell; that Thomas C. McConnell made response to said subpoena *duces tecum* in open court [Trial Record, p. 144] at which time he asserted that the tape recordings were his, McConnell's, work product and therefore privileged documents, that the court sustained McConnell's claim of privilege [Trial Record, p. 175] and that said tape recordings were at that time not produced in response to the subpoena *duces tecum*, a copy of which is hereto attached and marked Exhibit A.

229 Affiant further states that during the course of the aforesaid trial I caused a subpoena *ad testificandum*, copy attached hereto and marked Exhibit B, to be served on Paul D. Newey ordering him to appear as a witness on behalf of the plaintiff; that when Paul D. Newey reported as a witness in said cause he then and there had in his possession and control the tape recordings which plaintiff had demanded in Exhibit A hereto, a certified written transcription of said tape recordings, and a letter dated March 18, 1953 addressed to Paul D. Newey from Thomas C. McConnell, copy of said letter being attached hereto and marked Exhibit C.

Affiant further states that the letter permitted the witness to submit the tape recordings to this plainiff for use in the trial of this case; that, in accordance with this letter, the witness Paul D. Newey, before he testified, did submit these tape recordings to plaintiff for their use in the case as the best evidence of the conversations recorded thereon; that in order to use said tape recordings as evidence it was necessary to audibly reproduce the tape recordings for the benefit of the court; that in order to play said tape recordings it was necessary to install and set up in the court room of the Honorable William C. Campbell certain mechanical electronic devices; that I had investigated the time necessary to install said devices and had been informed by reliable sources that it would take from two to three hours to make the installation; that at the trial of said cause, on the 19th day of March 1953, affiant informed the court that Paul D. Newey would appear next day, March 20, 1953, as a witness on behalf of the plaintiff, that the said witness would produce the tape recordings previously made by him at the request and direction of Thomas C. McConnell, and that in order to play said recordings

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it was necessary to install electronic devices [Trial Record, p. 2211]; that at said time the plaintiff moved for permission of the court to have said devices installed that night, March 19, 1953, for use in court the next day during the giving of testimony by Paul D. Newey [Trial
230 Record, p. 2211]; that the court stated that Thomas C. McConnell had asserted the tape recordings to be his work product and therefore privileged [Trial Record, p. 2211]; that affiant asserted and informed the court that Thomas C. McConnell had, as shown in Exhibit C attached hereto, withdrawn his claim of privilege and had authorized the witness Newey to use aforesaid tape recordings [Trial Record, p. 2212]; that affiant produced the said letter Exhibit C and at the request of the court showed Exhibit C to the court who read Exhibit C and after reading it denied plaintiff's request to install electronic devices [Trial Record, p. 2213]; that said Exhibit C was not marked for identification or offered in evidence.

Affiant further states that the tape recordings were not marked or offered in evidence by the plaintiff since permission to install the necessary equipment to play the tape recordings was denied and therefore such offer on the part of the plaintiff would be useless.

Further affiant saith not.

EARL A. JINKINSON
Earl A. Jinkinson

Subscribed and sworn to before me by the said Earl A. Jinkinson this 25th day of June 1953.

KATHRYN M. REILLY
Notary Public within and for the County of Cook, State of Illinois
My commission expires
March 23, 1957

(Seal)

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Exhibit A to Affidavit

Subpoena Duces Tecum Case No. 51 C 947

UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF ILLINOIS

THE PRESIDENT OF THE UNITED STATES OF AMERICA

To THOMAS C. McCONNELL
Suite 1110—134 So. La Salle Street
Chicago, Illinois

—GREETING:

WE COMMAND YOU, that all business and excuses laid aside, you and each of you attend before the Honorable WILLIAM J. CAMPBELL one of the Judges of the United States District Court for said District, on the Sixth day of March, A. D. 1953, at 10:00 o'clock in the A.M. in Room 450 United States Court House in Chicago, in said District, to testify and give evidence in a certain cause now pending and undetermined in said Court, wherein UNITED STATES OF AMERICA is Plaintiff and THE BORDEN COMPANY ET AL. are Defendants, on the part of said Plaintiff. And that you also diligently and carefully search for, examine, and inquire after and bring with you, and produce at the time and place aforesaid,

1. The Bowman Dairy Company Sales Committee original minutes of H. C. Eggleston for the period of October 16, 1940 to date.

2. The original or copy of the deposition of Hezikiah C. Eggleston taken March 23, 1951 in the case styled *Dean Milk Company* v. *American Processing and Sales Company et al.*, Civil Action No. 49 C 1159 and reported by Leon M. Golding and Associates including the affidavit thereto made by S. Anita Man, a notary public.

3. The original nine-page statement made by H. C. Eggleston and sworn to before Irene M. Koenig, notary public, on January 29, 1951 concerning the affiant Eggleston's connection with the milk industry and the activities of the affiant Eggleston and others in the milk industry.

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4. The original tape recordings made by Paul Newey of interviews with the solicitors, salesmen and other employees of The Borden Company, Bowman Dairy Company, American Processing and Sales Company, Belmont Dairy Company, Beloit Dairy Company, Capitol Dairy Company, Hunding Dairy Company, Meadowmoor Dairies, Inc., Ridgeview Farms Dairy, Inc., and United Dairy Co. during the year 1950.

5. The original (if not available, copies thereof) written transcriptions made from the tape recordings referred to in paragraph 4 of this subpoena.

And this you shall in nowise omit, under the penalty of the law in that case made and provided.

To the Marshal of the Northern District of Illinois to execute and return in due form of law.

ROY H. JOHNSON
Clerk
By ROLAND C. KRUMB
Deputy Clerk

Dated: March 4, 1953

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Exhibit B to Affidavit

Subpoena Case No. 51 C 947

UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF ILLINOIS

EASTERN DIVISION

THE PRESIDENT OF THE UNITED STATES OF AMERICA

To MR. PAUL NEWEY
1120 W. Fullerton Avenue
Chicago, Illinois

Greeting:

WE COMMAND YOU, that all business and excuses being laid aside, you and each of you attend before Honorable WILLIAM J. CAMPBELL, Judge of the United States District Court for the Northern District of Illinois in Room 450, United States Court House, Chicago, Illinois, in the Eastern Division of said District on the second day of March A. D. 1953, at 10:00 A. M., to testify and give evidence

on behalf of the Plaintiff in a case pending and undetermined in said Court, wherein United States of America is plaintiff and The Borden Company et al. are Defendants, Cause No. 51 C 947. And this you shall in nowise omit, under the penalty of the law in that case made and provided.

To the Marshal of the Northern District of Illinois to execute and return in due form of law.

WITNESS, the Honorable WILLIAM J. CAMPBELL Judge of the said Court, at Chicago, in said District, this 26th day of February, in the year of our Lord one thousand nine hundred and fifty-three, and of the Independence of the United States of America the 177th year.

.....

Clerk

Exhibit C to Affidavit

233 McCONNELL, LUTKIN & VAN HOOK
134 SOUTH LA SALLE STREET
CHICAGO 3

THOMAS C. McCONNELL
HARRIS CARMAN LUTKIN
HUBERT VAN HOOK
JOHN L. DAVIDSON, JR.
JAMES O. SMITH

Telephone
RAndolph 6-9131

March 18 1953

Mr. Paul D. Newey,
1120 Fullerton Ave.,
Chicago, Illinois.

Dear Mr. Newey:

You have informed me that you have been subpoenaed as a witness by the Government to testify in its civil antitrust case against Bowman, Borden and other dairy companies pending in the District Court in Chicago.

In that connection you have requested that you be permitted to refresh your recollection of the conversations with various solicitors for the above named dairies as recorded on certain tape recordings and the transcripts thereof in my possession.

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I have discussed this matter with the officials of Dean Milk Company and they agree with me and with my associate counsel, Healy & Stickler, that you should be given every opportunity to protect yourself as a witness in relation to any subject matter with which Dean Milk Company is vitally concerned. In their view and in ours it is of the utmost importance that your credibility as a witness in relation to any of said subject matters must be preserved for the benefit of Dean Milk Company, and under the circumstances we and the company have no objection to your use of the tape recordings and the transcripts thereof for such purposes.

Accordingly, I am turning over to you the tape recordings involved and the transcripts thereof with this letter to evidence your authority on behalf of Dean Milk Company, myself and Healy & Stickler to use such tape recordings and the transcripts thereof for the purpose of protecting yourself as a witness in the Government proceedings above mentioned, whether under direct examination or otherwise.

In this regard, if the Court sees fit to require you to do so you may submit the tape recordings and the transcripts thereof to the defendants in the case as well as to the Government for their use in the case. If you relinquish the tape recordings and the transcripts thereof for any reason, please do so only upon trust receipt and make all necessary arrangements for their return to me at the earliest possible occasion.

Yours very truly,

THOMAS C. MCCONNELL

McC K

APPROVED:

HEALY & STICKLER

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235 IN THE

UNITED STATES DISTRICT COURT

[TITLE OMITTED]

Order Denying Motion of Defendants Bowman Dairy Co. and Ridgeview Farms Dairy, Inc. to Amend, Etc.—filed July 2, 1953

Upon due consideration the Court being fully advised in the premises it is

ORDERED that the motion of defendants Bowman Dairy Company and Ridgeview Farms Dairy, Inc. to amend certain of the findings of fact and conclusions of law heretofore entered by the Court be and the same hereby is denied.

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237 [FILE ENDORSEMENT OMITTED]

IN

UNITED STATES DISTRICT COURT

[TITLE OMITTED]

Motion of Defendants Borden, Belmont, Bowman and Ridgeview to Strike from the Record Certain Exhibits Attached to Plaintiff's Motion for a New Trial—filed July 6, 1953

Defendants BORDEN, BELMONT, BOWMAN and RIDGEVIEW move the Court for an order striking from the record Exhibits 5 and 6, and Exhibit C to Exhibit 7, all attached to plaintiff's motion for a new trial, on the ground that said exhibits are an attempt to incorporate into the record matter which may not properly be made a part thereof.

In support of the aforesaid motion, defendants show:

1. All of the material contained in the exhibits was available to plaintiff at the time of trial.

2. To the extent that the material contained in the exhibits is admissible in evidence, or could have been used in an attempt to impeach the witness Eggleston, or for any other purpose, such material should have been used at the trial itself, either by placing witnesses on the stand and

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giving defendants an opportunity to make objections and to cross examine said witnesses, or by making an offer of proof.

3. The exhibits contain no newly discovered evidence or other matter which can properly be submitted to the Court at this time.

Respectfully submitted,

STUART S. BALL
Stuart S. Ball

JOSEPH A. GREAVES
Joseph A. Greaves

BLAIR WHITE
Blair White

Attorneys for
The Borden Company
and Belmont Dairy Company

L. EDWARD HART, JR.
L. Edward Hart, Jr.

ERNEST J. LONDON
Ernest J. London

Attorneys for
Bowman Dairy Company and
Ridgeview Farms Dairy, Inc.

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239 IN THE

UNITED STATES DISTRICT COURT

[TITLE OMITTED]

Order Denying Plaintiff's Motion for a New Trial—filed August 6, 1953

The Court being fully advised in the premises is

ORDERED that the motion of defendants, The Borden Company, Belmont Dairy Company, Bowman Dairy Company and Ridgeview Farms Dairy, Inc., for an order striking from the record certain exhibits attached to plaintiff's motion for a new trial be and the same hereby is denied and it is

FURTHER ORDERED that the plaintiff's motion for an order that the judgment heretofore entered herein be set aside

and a new trial granted, or, in the alternative, that said judgment be opened, additional testimony taken, the findings of fact and conclusions of law amended and a new judgment entered be and the same hereby is denied.

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240A [FILE ENDORSEMENT OMITTED]

IN THE

UNITED STATES DISTRICT COURT

[TITLE OMITTED]

Before

HONORABLE WILLIAM J. CAMPBELL,

Judge.

Transcript of Proceedings—filed November 4, 1953

Court convened pursuant to adjournment.

Present:

MR. EARL A. JINKINSON,
MR. THOMAS M. KERR, JR.,
MR. THOMAS ROTHWELL,
MR. BERTRAM M. LONG,
MR. E. C. HEININGER, and
MR. ROBERT L. EISEN,
On behalf of the Government;

240B MESSRS. SIDLEY, AUSTIN, BURGESS & SMITH,
BY: MR. STUART S. BALL,
MR. H. BLAIR WHITE, and
MR. CECIL CROUSE,
On behalf of Defendants The Borden Company and Belmont Dairy Company;

MESSRS. MONTGOMERY, HART, PRITCHARD & HERRIOTT,
BY: MR. EDWARD L. HART, JR., and
MR. ERNEST J. LONDON,
On behalf of Defendants Bowman Dairy Company and Ridgeview Farms Dairy, Inc.;

MESSRS. MAYER, MEYER, AUSTRIAN & PLATT,
BY: MR. LEO F. TIERNEY, and
MR. CHARLES L. STEWART, JR.,
On behalf of Defendants Beloit Dairy Company.

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240C COLLOQUY BETWEEN COURT AND COUNSEL

The Court: The Government may proceed.

Mr. Jinkinson: I call Mr. William Horton as the first witness for the Government.

Mr. Ball: In connection with the calling of the Government's first witness, for the purpose of condensing the argument as much as possible, I would like to suggest a list of standing objections on behalf of the defendants to be taken to the testimony.

Most of these objections are objections that relate to the matter of possibly the tying up of the evidence with some later evidence. It seems to us a recitation of these and an agreement might save time. I would be happy to read them into the record.

The Court: Would you have your witness be seated while I hear what they are?

Mr. Jinkinson: Yes.

The Court: First of all, before you proceed, let the record show that pursuant to agreement at the pre-trial conference, which has resulted in this very extensive pre-trial order just entered by the Court, both sides have waived opening statements, and we will proceed immediately with the evidence in the case, the Court having been fully apprised of the positions of both sides during the ex-
240D tended pre-trial conference.

Mr. Jinkinson: That is right.

Mr. Ball: These are the objections which defendants would like to have understood as being taken wherever applicable without the necessity of repeating them:

1. Each defendant objects to testimony—

The Court: Do you want to read them?

Mr. Ball: I would like to read them, but you might like to have a copy.

The Court: Yes. Thank you.

Mr. Ball: 1. Each defendant objects to testimony as to conversations between employees of other defendants, or between an employee of another defendant and an employee of a non-defendant, as not binding upon the objecting defendant, as hearsay, and as not competent to prove any issue in the case with respect to it.

2. Each defendant objects to testimony as to utterance or statements of employees of another defendant, as not binding upon the objecting defendant, as hearsay, and as

not competent to prove any issue in the case with respect to it.

240E 3. Each defendant objects to all testimony of actions or utterances unless shown to have occurred subsequent to September 16, 1940, as not tending to prove or disprove any of the issues of this case.

4. Each defendant objects to all testimony of actions or utterances unless related to matters shown affirmatively to have occurred in interstate commerce, as not tending to prove any violation charged in the complaint.

5. Each defendant objects to all testimony of actions or utterances unless shown to be related to the sale of fluid milk as defined in the pretrial order to wholesale customers in the Chicago area, as wholesale customers, and the Chicago area as defined in the complaint or to the public institutions listed in the complaint: on the ground that such testimony does not tend to prove or disprove any issue in the complaint.

6. Each defendant objects to any reference in testimony to any letters, records, documents, or memoranda of another defendant, or of a non-defendant, as hearsay, as not binding upon the objecting defendant, and as incom-
240F petent to prove or disprove any issue as to the objecting defendant.

7. Each defendant objects to any evidence as to any transaction between other defendants, or between another defendant and any non-defendant, as incompetent to prove or disprove any issue as to the objecting defendant.

The Court: Now, all of these objections, of course, are with relation to testimony, oral testimony about to be heard, and do not in any way, except as they may be enumerated in the pretrial order, apply to provisions of the pretrial order.

Mr. Ball: No, they are not to apply to the pretrial order.

The Court: Very well.

Mr. Ball: Matters therein covered, if objections are to be made, will be specifically made at the time.

Mr. Tierney: If the Court please, I take it this is to apply to all defendants?

Mr. Ball: I hope so.

Mr. Tierney: There is just one reservation I would like to have. I think I would like to respectfully suggest to your Honor that you might rule on some of these objec-

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tions as the witness testifies, and I would like to
240G repeat it.

Mr. Jinkinson: Your Honor, I would like to explore the Government's position in this just a little bit. I have no objection to counsel stating the form or the nature of the objection, but am I to understand the Government is going to be bound by the blanket objections which refer to the trial, and every objection, whether it is proper or not, is going to fit into these objections, and counsel are now relieved from the lawyerlike duty of objecting to the testimony of the witness?

The Court: The only purpose of stating these general objections at this time was, as I indicated, in answer to a query of Mr. Ball's this morning, that it might save time in the introduction of evidence.

Now, the situation here is this. We have no jury here, and it is my thought that insofar as any materiality is shown at all, that I would allow evidence to go in and rule on any objections that may be made as the evidence is offered, and I would also let the evidence in general be subject to these general objections, which I would herein now overrule.

I do that, however, with the reservation that in the briefs at the end of all the evidence, if it appears that data is not connected up, certain evidence is not con-
240H nected up, or if it appears from the final testimony that some of it is purely hearsay, that that may still be argued by the parties in their briefs, and in that way we will save considerable time in getting the evidence in before the Court as quickly as possible, and I think that will work to the advantage of the Government as well as the defendants.

Do I make myself clear?

Mr. Jinkinson: Yes, your Honor.

The Court: And is that agreeable?

Mr. Jinkinson: Of course, it goes without saying, of course, that each side is permitted an exception under the rules, without the necessity of stating it?

The Court: Under the rules, you don't have to take an exception any longer.

With that general understanding, I will allow these objections to stand as to the testimony to which the general objections will apply, and insofar as I can at the present time the same are overruled.

The parties, as I indicated, to any of the objectionable testimony may still argue the matter of its relevancy, materiality, or hearsay in their briefs.

I think that will save time all along, and save you jumping up at every other question.

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241 WILLIAM H. HORTON, a witness, called on behalf of the Government, having been first duly sworn, was examined and testified as follows:

Direct Examination by Mr. Jinkinson:

Q. Will you state your name? A. William H. Horton.
Q. Where do you reside? A. 400 East Arbor Road, Long Beach.

The Court: Is that H-o-r-t-o-n?
The Witness: A-r-b-o-r.
Mr. Jinkinson: The judge asked you the spelling of your last name.
The Witness: H-o-r-t-o-n, yes, sir.

By Mr. Jinkinson:

Q. What is your present occupation? A. Bookkeeper.
Q. In what business? A. Morning Call dairy business.

The Court: In what firm?
The Witness: Dairy Business, Morning Call Dairy.

* * * * *

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By Mr. Jinkinson:

Q. Did you have any conversation with anyone at Bowman Dairy with reference to the stops you solicited in the apartment building in the basement? A. Well, after I served the stop, about a week or so later, Mr. Phillipi—

Mr. Hart: If the Court please, I am going to object to any conversation with Phillipi. He is now deceased.
243 The Court: Is he now deceased?
Mr. Hart: Yes, sir, and has been for ten-odd years.
The Court: The objection is good in Illinois.
244 Mr. Jinkinson: Counsel for the Government has pointed out that the dead man's rule doesn't apply unless it is against the dead man's estate or interest.
The Court: No, it applies with any conversation with a dead man, unless some other officer of the corporation was involved and was present. I mean, the purpose of the rule is that where the lips of one party to a two-party conversation is sealed in death, the living party may not testify to what it was.

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By Mr. Jinkinson:

Q. Let me ask one more question: Was anyone else present at the conversation? A. Mr. Moller.

Q. And who was Mr. Moller? A. Mr. Moller was then manager of the Englewood Division of the Bowman Dairy Company.

Q. Present at this conversation was Mr. Moller, Mr. Phillipi, and you? A. And myself.

The Court: The objection is overruled.

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THOMAS C. MCCONNELL, called as a witness for the Government, having been first duly sworn, was examined and testified as follows:

Direct Examination by Mr. Jinkinson:

Q. Will you state your name, please? A. Thomas C. McConnell.

Q. Where do you reside, Mr. McConnell? A. Wilmette, Illinois.

Q. What is your occupation? A. I am a lawyer.

Q. You have offices in Chicago? A. I do.

Q. At what address? A. 134 South LaSalle Street.

Q. Mr. McConnell, were you recently served with a subpoena? A. Yes.

249 Q. In case No. 51 C 947 now pending before this Court? A. Yes.

Q. Do you have a copy of the subpoena before you? A. I do.

Q. Have you read the same? A. Yes.

Q. And how do you respond to the subpoena? A. Well, I have the documents, except Item 1, which doesn't cover the same period that you have. I haven't all those documents.

Q. Do you have the Document No. 1, or do you not have it? Do you have one for another period?

Mr. Tierney: What is that, Mr. Jinkinson?

The Witness: It is the period of October 16, 1940, to date.

The Court: Read the description of the document.

By Mr. Jinkinson:

Q. "The Bowman Dairy Company, Sales Committee Original Minutes of H. C. Eggleston, for the period of Oc-

tober 16, 1940, to date."? A. The documents that I have go until May 27, 1943, and start December 17, 1940.

250 Q. But do you have those? A. I have those.

Q. And do you have the rest of the items? A. I have the rest of the documents that were requested in this subpoena.

Mr. Ball: May we have the rest of the subpoena's contents read?

The Court: Yes, read it into the record, what the rest of the subpoena calls for.

Mr. Jinkinson: All right, I will read it.

"2. The original or copy of the deposition of Hezikiah C. Eggleston, taken March 23, 1951, in the case styled Dean Milk Company vs. American Processing and Sales Company, et al, Civil Action No. 49 C 1159, and reported by Leon M. Golding and Associates, including the affidavit thereto made by S. Anita Man, a Notary Public.

251 "3. The original nine-page statement made by H. C. Eggleston and sworn to before Irene M. Koenig, Notary Public, on January 29, 1951 concerning the affiant Eggleston's connection with the milk industry, and the activities of the affiant Eggleston's connection with the milk industry, and the activities of the affiant Eggleston and others in the milk industry.

"4. The original tape recordings made by Paul Newey of interviews with the solicitors, salesmen and other employees of the Borden Company, Bowman Dairy Company, American Processing and Sales Company, Belmont Dairy, Beloit Dairy Company, Capitol Dairy Company, Hunding Dairy Company, Meadowmoor Dairies, Inc., Ridgeview Farms Dairy, Inc., and United Dairy Company during the year 1950.

252 "5. The original (if not available, copies thereof) written transcriptions made from the tape recordings referred to in Paragraph 4 of this subpoena."

The Court: Very well.

Mr. Ball: Defendants object to the witness producing the deposition, or a copy thereof, of Hezikiah Eggleston, for the reason that such deposition was taken under order of Court in a case in this Court entitled Dean Milk Company against the Borden Milk Company, and various other defendants, under protective orders of the Court that provided for the sealing of the deposition, which presently

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remains sealed under orders, which prescribed that that deposition should not be opened except by counsel for the parties to that case, under protective orders which in their effect prevent the use or turning over of those depositions to outside parties.

The further ground, that the Government has already moved in the case of Dean Milk Company vs. Borden
253 Company for privilege to open the sealed depositions, which has been denied by Judge Igoe under an injunction to counsel pointing out that the Dean Milk Company case has been settled, and as part of the settlement it was understood, doubtless, that these documents would remain sealed and not be made available to outside parties.

The Court: The objection that you voice may well be persuasive in the event that he attempts to offer the deposition here. The only matter now before the Court is whether or not the witness in obedience to the subpoena duces tecum should deliver these documents to counsel for the Government.

Mr. Ball: It is exactly the delivery to counsel for the Government to which the objection is directed, because the delivery would be a breach of the orders of Judge Igoe, as we construe them.

The Court: Were you of record in the case before
254 Judge Igoe?

Mr. Jinkinson: I was not, no, sir.

The Court: Are you aware of these orders?

Mr. Jinkinson: Yes, sir.

The Court: Is that your office copy of it, Mr. McConnell?

The Witness: Yes, that is my office copy. It is a copy of a deposition which I took in my office in the Dean Milk case.

The Court: Is the original of this deposition still on file with the Clerk of this Court and still sealed?

Mr. Hart: That is right.

The Court: Let me see the order of Judge Igoe.

Mr. Hart: Here it is.

The Court: You have a copy of this order, Mr. Jinkinson?

Mr. Jinkinson: I have. It is not available right now, but I will send for it.

The Court: You are familiar with it?

Mr. Jinkinson: I have read it. I wouldn't say I am
255 familiar with it.

The Court: That is more than I have done.

Mr. Ball: May I say, to correct one statement Mr. Jinkinson said, I believe he said he was not attorney of record, but Mr. McCareins of the Government did make the motion.

Mr. Jinkinson: I thought your Honor understood that someone from the office appeared. It was not necessary to say, and it is not a correction of the record. There was nothing at issue in the matter.

The Court: Well, I will read the order. The transcript shows that Mr. McCareins was present, Mr. Stevens, Mr. McSweeny, and Mr. Lucente.

Mr. Ball: Defendant would like to answer their objection with the further objection that the copy of this deposition is not the property of the witness now on the stand, but is the property of his client, the Dean Milk Company.

The Court: Well, the original of the deposition is the property of this Court, and the Judge before whom
256 the deposition was authorized to have been taken has ruled that it is sealed, and that the seal is inviolate. I don't see that there is anything for me to discuss.

Do you have anything of interest you want to add?

Mr. Jinkinson: Well, your Honor, I don't know from the record, it is my understanding that in the Judge's order in the record he left the door open for Judge Campbell to procure this deposition if he wanted to.

The Court: He concludes by saying, first of all, on Pages 3 and 4 of this transcript, and then refers to the Government as more or less of an interloper in this Dean case, coming in and asking for the deposition, and that they are no different from anyone else coming in and making a similar request. And then he quotes:

"We have a local rule about depositions being sealed, about their not being permitted to be opened except by the parties to the litigation, or except by an order of the
257 Court.

"You also have this proposition, that the litigation in this case in which this motion was made has now been ended by consent decree. The judgment for money has been entered, and an injunction has been entered. The case has been concluded.

"I don't think that it is at all unreasonable to say that at the time the decree was consented to by the defendants, they must have had in mind that the secrecy surrounding these depositions would be protected, and the seal under which they were sealed in this Courthouse would not be violated.

"Now, that decree has been entered, as I say, and the judgment has also been entered. The matters have been concluded.

258 "To me it seems kind of unreasonable to say that after all that has been gone through, when and after,

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no doubt, the defendants have considered that the matters revealed in those depositions were protected under the seal of this Court, that after all that has been concluded, then some outsider might come in here and say, Well, we want that seal broken, and we want revealed everything that is contained in those depositions.

"That is the sort of procedure that does not appeal to me for two or three reasons. One is that I don't think that the Government is any party to this litigation. I don't think that they have any stand in this litigation. I don't think that they can properly make this kind of a motion for the reason that the Rule Book provides that the
259 seal upon these depositions can only be broken in a certain fashion; and for the further reason that the consent decree which has been entered here, and no doubt we are justified in presuming that at the time of the entry of this consent decree the people who participated in the decree had in mind the seal upon these depositions would not be broken.

"These are some of the reasons why I think this motion should be denied.

"You may prepare your order to that effect. I will say this—"

Now, this is apparently what you are referring to, Mr. Jinkinson?

Mr. Jinkinson: That is right.

The Court: He concludes with this sentence:

"I will say this. If Judge Campbell wants the depositions, all he has to do is send an appropriate order down here, and we will recognize it, and he can take the
260 depositions up there and rule on it as he sees fit."

That is the end of the quotation and order in Judge Igoe's Court.

In other words, he concludes by saying that if I want to by order personally overrule his respect of the seal in a deposition in his case, I may go ahead and do so, and he will respect that order.

But it doesn't affect the decision that he has previously made in his own case as I read it, and in accordance with the rules of this District.

Now, assume I allow you to take this copy of the deposition. I assume the reason you want it is you want it read here?

Mr. Jinkinson: No, that is not the reason.

The Court: What do you want it for?

Mr. Jinkinson: Well, I will be frank and tell the Court the reason why I want it.

We talked to the witness Eggleston. As a matter of fact, he has been before the Grand Jury on two occasions in
261 the criminal case. He has been interviewed by members of the staff of Government attorneys on two or three different occasions. He has given a deposition in the Dean case. He has made an affidavit which we have seen a copy of.

Notwithstanding that, I talked to him yesterday in the office, and he says he is going to deny all these things, the things I want. The reason I want this deposition in the Dean case is for the purpose of impeachment.

The Court: Has the deposition been taken of Mr. Eggleston? Is that his name, Eggleston?

Mr. Jinkinson: Yes, sir.

The Court: Has a deposition been taken of Mr. Eggleston in this case?

Mr. Jinkinson: No, sir. However, we are prepared to argue the law, that the law is that a deposition taken in another case can be used for impeachment purposes.

The Court: Certainly, if it is available to be used. The question here, is the deposition available. Any con-
262 trary statement under oath taken at any time that doesn't appear to be in another case can be used for the purpose of impeachment. You don't have to argue the law on that. I was anticipating what law you have that authorized me to break the seal of a deposition that has been ordered sealed and kept secret by the Judge before whom the case is pending, and in pursuance to the rules of this Court.

Mr. Jinkinson: The Government's position then is this, and see if I can state it clearly and briefly.

First, Judge Igoe's ruling probably was correct, inasmuch as the Government was making a motion in a case in which it was not a party thereto. We were intervening in a case in which we had no business to be in.

I am not now making any motion to get a deposition which is sealed in another case. I have served a subpoena on the witness to secure a document, a copy of the
263 original which he has in his possession.

Now, I think the sovereign state of the United States has a right to procure its evidence wherever it can, and I don't think any Court should shut off the United States which is here trying to enforce a statute, or that any Court has the right to deny the Court's evidence which is available and which the Government knows is available.

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The Court: Yes, but this isn't evidence which is available. That is the very point.

Judge Igoe has ruled that it is not, and the reason that he was able to get a consent decree in his case was because he sealed these and kept them sealed.

Now, how would you put on this Eggleston, as an adverse witness? Of course, you would have leave to cross examine him, I suppose.

Mr. Jinkinson: That is right.

The Court: So in support of your case you want to put on a hostile witness?

264 Mr. Jinkinson: Yes, sir.

The Court: And then use this deposition to impeach him?

Mr. Jinkinson: Right.

Mr. Ball: May I inquire how counsel knows whether this deposition will impeach him?

Mr. Jinkinson: You may inquire, yes.

The Court: But he will not answer.

Mr. Jinkinson: Thank you.

The Court: I see no authority for my overruling Judge Igoe's order.

Mr. Jinkinson: Your Honor, of course, our contention is that the usual reason for sealing depositions, of course, is to prevent any changes which might occur in the document.

The Court: That is one reason. But there are others. The rule of this Court is clear on filing depositions. They are to be used in a certain case, and then if the case does not proceed to trial, if the deposition was taken for evidentiary purposes, it is not available for anything else.

265 If it was sealed and filed with the Clerk, that is one of the protections litigants have.

I sustain the defense's objection to the production of the deposition.

Mr. Ball: Now, I wish to make an objection.

Mr. Jinkinson: Just a moment. I don't see where counsel has a right to object to production of documents. He is not a party to the subpoena. I don't think he has the right to quash the Government's subpoena.

The Court: He has a right to object to their production here, and I have sustained it. Is there anything else before the Court.

Mr. Ball: There is another item to which I wish to object. May I look at your subpoena?

Mr. Jinkinson: No, you may not.

The Court: The witness will furnish his copy of the subpoena to counsel.

(The witness handed document to Mr. Ball.)

266 Mr. Ball: Defendants object to the production of Items 4 and 5 called for in the subpoena, and the making of them available to the Government.

The Court: What are they?

Mr. Ball: These items are:

4. The original tape recordings made by Paul Newey of interviews with the solicitors, salesmen, etc.,

and

5. The original or copies of written transcriptions made from the tape recordings.

The defendants object for the reason that defendants who are also parties in the case of Dean Milk Company vs. The Borden Company sought to subpoena these records, and that the subpoena was denied on the ground that these constituted the work product of the witness, and his employee, Mr. Newey, and were, therefore, not available.

267 Defendants object to the production of these documents and use by the Government in view of their previous denial on that ground.

On the further ground that the witness himself is not empowered to waive any privilege since as the work product of the witness and his employee it can only be waived by his principal and client, the Dean Milk Company, and no such waiver is shown here.

The Court: That is a relationship between himself and his client. It is not urged by him.

Your objection is overruled.

Any other objections?

Mr. Ball: I have some cross examination of the witness, if your Honor please, when the Government is through.

The Court: He hasn't testified to anything yet, so you can't cross examine him. He said he is willing to produce these documents.

Are there objections to his producing any of the
268 others?

Very well, then, the only objection sustained is that with reference to the deposition in the Dean Milk Company case.

You may proceed, Mr. Jinkinson?

By Mr. Jinkinson:

Q. Mr. McConnell, how do you respond to the subpoena? A. Well, I have responded by producing here in Court the documents which I have which are listed here.

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Now, I haven't taken the position that I am waiving anything. I never had a chance to make any statement on that.

I have physical possession of these documents, and whether or not I am to produce them, I suppose is a matter for the Court to rule.

Now, I will say this, that on Item 4 I had a very bitter argument in the proceeding with these gentlemen who are representing the milk companies here, in which they attempted to compel me to produce in that case the result of my research into the milk industry.

I had taken the tape recordings through this fellow, Newey, who I understand is also subpoenaed here as a witness.

269 I raised the objection that these defendants' lawyers were not entitled to go into my files, and go into my work and find out what I did in that case.

I am still in a lawsuit with them. We have a decree. We have a settlement of a money amount, but we still have an injunction pending in Judge Igoe's Court.

There is still $400,000 of money which is unpaid on the settlement. And I do not want by my silence to waive the position which I took before Judge Igoe that that is my property.

It is subject to your Honor's ruling, of course, and I accede to your Honor's ruling in anything that your Honor rules, and, of course, I will abide by that.

The Court: Do you here assert the privilege of attorney-client relationship with reference to these documents, other than the deposition on which I have already ruled you will not produce it?

The Witness: I don't raise any question of privilege at all. The only question I raise is that this is my property which I obtained by my own efforts in order to find

270 out what was going on in this milk industry, and that it does place me at considerable disadvantage in dealing with these gentlemen in the future if it is now made public to them after the Court has ruled in Judge Igoe's Court that they are not entitled to it.

Mr. Ball: May I ask also, if the Court please, that if this witness does not insist on his privilege as to the Government, that we be given the privilege of serving a subpoena for the production to us also of these same matters?

The witness: I am objecting to your giving him them. That is the objection that I have. I am still an antagonist, I am still in antagonistic litigation with these gentlemen.

They would like to know a lot of things that are in my file, I imagine.

Mr. Tierney: If the Court please, the Beloit Dairy Company was not a party to the Dean case, and I would
271 like to have the same privilege for Beloit Dairy Company.

The Court: Of course, if I require him to furnish these documents, tape recordings, and whatever else is listed in this subpoena here, they will be available to all sides. There is no need of serving another subpoena on behalf of the defendants. The subpoena isn't a subpoena of either the plaintiff or the defendants. It is the subpoena of the Court, and if, under the subpoena, I require him to produce them, they are available to both sides. It is silly to require the issuance of another one.

The question is whether or not under the circumstances this man should be required to turn this property over in obedience to the subpoena.

He said these gentlemen representing the defendants might make some antagonistic use of it with reference to other litigation that is still pending under a decree in this Court.

272 Has this witness to whom these tape recordings refer been interviewed by the Government?

Mr. Jinkinson: He has.

The Court: And is he going to take the stand for the Government?

Mr. Jinkinson: Yes, sir, he is.

The Court: Then why do you need these tape recordings?

Mr. Jinkinson: Because we wanted to play them for the Court so the Court could hear them.

The Court: What are they, recordings of different people's voices?

Mr. Jinkinson: That is right, your Honor.

The Court: Taken by this witness?

Mr. Jinkinson: Taken by this witness.

The Court: In connection with an investigation he was conducting for you, Mr. McConnell, in the Dean case?

The Witness: He was an employee of mine, your Honor, and I put him to work in a grocery store taking tape recordings of what went on between the grocery owners and
273 the different solicitors for the different dairies, and they are tape recordings of these conversations.

I took the position before Judge Igoe that that was my own preparation of that lawsuit. It was not evidence. It was done to enable me to properly try that case, and that

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it was my own work product, and under the decision of the Supreme Court, I have forgotten the decision now, that it was not subject to subpoena any more than my mental thoughts were subject to subpoena.

274 The Court: Do you still take that position here?

The Witness: I still take that position, because if it is granted to the Government here, if it is made available to all of the defendants' counsel, and I am still in litigation with them, and for that reason I take that position.

The Court: In other words, you are appearing in obedience to the subpoena, and if you are ordered, you are willing to turn them over, but you are taking the position that these are your property, as a result of your own investigation of a prior litigation, and you want your property rights respected as an attorney?

275 The Witness: Exactly.

The Court: What do you want to say?

Mr. Hart: If the Court please, there is one other thing. I will ask Mr. McConnell to check me on this. At the time that we subpoenaed the same recordings and transcript before Judge Igoe—

The Court: You were a defendant in that case.

Mr. Hart: Mr. McConnell and I argued the case at some length before Judge Igoe, and Judge Igoe's statement was, I believe, that the only possible use of the recordings would be to impeach anyone who denied them.

Now, as I understand it, Mr. Newey, who took the recordings, heard all of the conversations, is going to testify for the Government.

Now, I am at a loss to find out whether they intend to impeach Mr. Newey by these things. I take it that they are not producing Mr. Newey as an adverse witness. He heard everything that the recordings could possibly cover.

276 The Court: The only purpose of playing the recordings here then, Mr. Jinkinson, would be to substantiate or support the testimony of the witness Newey.

Mr. Jinkinson: That's right.

The Court: And you intend introducing him as a Government witness?

Mr. Jinkinson: That's right.

The Court: He is not adverse or unfriendly?

Mr. Jinkinson: Not that I know of, but of course you would have the benefit of hearing the exact testimony of solicitors for these defendants.

The Court: I don't mind. From a standpoint of personal curiosity I would like to listen to it, but that is beside the

point. The question is whether I have the legal right to listen.

Mr. Jinkinson: We urge that they be admitted. There is certainly plenty of law on that.

Mr. Ball: May I add one further fact? Mr. Newey was employed by you, and is a member of the Bar?

277 The Witness: That's right, he was on my payroll.

Mr. Ball: As an attorney?

The Witness: Yes.

The Court: He is a member of the Bar?

The Witness: Yes.

Mr. Jinkinson: It has been decided in U. S. vs. Goldman that tape recordings are admissible.

The Court: Of course they are, but the question is whether you can take the tape recordings made by an attorney in the preparation of his case, and that are his property, and play them in another case.

There is no question of admissibility about the tape recordings, if the testimony would otherwise be admissible. If I allowed you to take this tape recording, maybe I should allow you also to take the rest of Mr. McConnell's trial material. Maybe he has a lot of other interesting documents written up that would impress the Court here.

278 Of course, that is his property, for use in preparation for trial. The Government, or any other litigant, could be required to subpoena it in another case—that is the question before me, and as far as I know, the Supreme Court has held you are not allowed to do that.

Have you any authorities to the contrary?

Mr. Jinkinson: Not right now.

The Court: The tape recordings as evidence can be admitted, if they are otherwise admissible.

Mr. Jinkinson: We take a little different view, that it is evidence created by Mr. Newey.

The Court: He takes the position, however, that these are his work papers and part of his preparation for his case, that this man is an attorney whom he hired, that these tape recordings were taken at his expense, and to prepare for this trial, that it will embarrass him in the further handling of the case if he makes them available to

279 you or anyone else and they become public.

That is your position, isn't it?

The Witness: Exactly my position, your Honor, and further, I argued this thing at great length with the gentlemen who now sit here in the court room.

The Court: The defendants wanted them too, didn't they?

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The Witness: They wanted it, and Judge Igoe ruled that they were not entitled to it.

The Court: Of course, if they got it, they might not have played it here, and if he gets it, he will.

Mr. Ball: We don't know.

The Court: Well, I think Mr. McConnell's position is clearly justified, and I don't see any reason for requiring him to turn over that or any other portion of his work papers or his preparation for trial in another case.

I do not sustain the defendants' objection, because I don't think they are in position to object, but I sustain Mr. McConnell in his position that he is not required, in obedience to that subpoena, to turn these tape recordings over to the Government.

It is so ordered.

Are there any other parts of the subpoena to be ruled upon?

Mr. Hart: That would also, I take it, cover the transcript that was made by a stenographer from the tape recordings?

The Court: That is the same thing. What did you do, have it written down?

The Witness: I had someone come in and listen to it play, and write it down.

The Court: That is the same thing, only a written transcript of it.

You assert the same privilege with reference to that?

The Witness: Yes.

Mr. Tierney: I take it, Mr. McConnell, that Mr. Eggleston's affidavit was prepared by you in preparation of the case?

The Court: Oh, the affidavit of Eggleston, is that another item on this deposition?

The Witness: That was a statement as to what he is going to testify to.

The Court: Did you prepare that?

The Witness: Yes.

The Court: And that is part also, of your work papers?

The Witness: Yes, my preparation of the case, and I have no objection to turning it over, however.

The Court: The affidavit?

The Witness: I have no objection to that.

The Court: You have no objection to turning over the affidavit?

The Witness: Yes.

The Court: You do object to the tape recordings and the transcription thereof?

The Witness: That's right.

The Court: Thereafter let the affidavit be turned over, and the objection of the defendant Beloit is overruled.

Are there any other points on which you assert privilege?

282 The Witness: I asked my client if he had any attorney-client privilege to urge, so he said, "No," so there is no such objection.

The Court: Then the only one you are turning over is the affidavit?

The Witness: No, we have the original minutes. I have no objection to turning that over.

The Court: Of what?

The Witness: Of H. C. Eggleston in the sales meeting of the Bowman Dairy Company sales committee.

The Court: You have no objection to turning it over?

The Witness: I have no objection to turning it over.

The Court: Very well, you may deliver that in obedience to the subpoena.

Is there an objection?

Mr. Ball: No.

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H. C. Eggleston, a witness, called on behalf of the Government, having been first duly sworn, was examined and testified as follows:

Direct Examination by Mr. Jinkinson:

Q. What is your name, please? A. H. C. Eggleston, E-g-g-l-e-s-t-o-n.

Q. Where do you reside, Mr. Eggleston? A. 6230 LeMai Avenue.

Q. Chicago, Illinois? A. Chicago, Illinois.

Q. What is your occupation? A. I am connected with the Dr. Pepper Bottling Company.

The Court: The what?

The Witness: The Dr. Pepper Bottling Co.

287 By Mr. Jinkinson:

Q. Were you at one time connected with the milk industry in Chicago? A. Yes, I was.

Q. For how long a time? A. Oh, approximately 35 years.

Q. With what company? A. The Bowman Dairy.

Q. The Bowman Dairy Company all the time, the 35 years? A. Yes.

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Q. Will you just trace briefly for the Court your connection with the company, your first connection, and the various jobs you held up until 1940? A. I started with them as a route salesman. I was route foreman, Assistant Manager, Manager, Sales Supervisor, and Sales Manager of fluid milk sales.

Q. Now, from 1940 to June of 1943, what was your position with the Bowman Dairy Company? A. I think I was made Sales Manager in approximately 1941. Prior to that I was just a Sales Supervisor.

Q. And having certain designated territories under your supervision? A. I had certain Divisions to supervise.

288 Q. Were you in 1940 a member of the Board of Directors of the Bowman Dairy Company? A. Yes, sir.

Q. Were you a member of the Board of Directors at all times from September, 1940, to the time you resigned in June of 1943? A. Yes, sir.

Q. Now, what were your duties as Sales Manager of the milk division of the Bowman Dairy Company? A. Well, my duties were to supervise the sales. I was on the Labor Committee, and I was on the Advertising Committee. I sat in on labor negotiations, and on all meetings of the Advertising Committee.

Q. Did you have Sales Supervisors working under you? A. Yes, I did.

Q. About how many? A. Oh, in 1940 I believe there was two.

Q. Did that number increase between 1940 and 1943? A. No. I believe Mr. Buthman and Mr. Larson, and Mr. Cameron Peck, he was classified as a coordinator of sales.

Q. Under your supervision? A. He never classified himself as working under my supervision.

289 Q. Well, did you classify him as working under your supervision? A. No, because he wouldn't pay any attention to give me any authority at all.

The Court: About whom are we speaking?

Mr. Jinkinson: Cameron D. Peck.

The Court: Peck.

Mr. Jinkinson: Or D. Cameron Peck, I think is correct.

By the Witness:

A. If I remember correctly, he was put on as a Sales Supervisor, and along in about 1939 he supervised Rogers Park Division, and the Evanston Division.

By Mr. Jinkinson:

Q. Was he a relative of the President of the company? A. Yes, sir.

Q. What was the relation between the President of Bowman Company and D. Cameron Peck? A. Son.

290 Q. Mr. Eggleston, to whom did you report in your duties at the Bowman Dairy Company? To whom were you responsible? A. Well, when Mr. Adamson was there, I reported to Mr. Adamson.

He left the company in 1939.

Q. Who was Mr. Adamson? A. Mr. Adamson was a director and treasurer of the company at that time.

Q. In 1940, when you became sales manager, to whom did you report? A. I was made sales manager, if I remember correctly, in '41, not 1940.

Q. In 1940 your position was sales supervisor? A. Sales supervisor.

Q. To whom did you report at that time? A. There was no one in particular that I reported to.

Q. You had no superior? A. Well, there was a director there, for sure.

Q. Who was the president of the company? A. The president of the company was Cameron Peck. When he came with the company he took over practically the entire authority on sales and formed the policy on sales.

291 Q. And in 1941, when you became sales manager, to whom did you report? A. Mr. Phillipi.

Q. What was his position with the company? A. He was a director and sales supervisor.

Q. Well, maybe I don't have this straight.

Which was the highest position in The Borden Company, sales supervisor or manager of sales? A. Well, I would say manager of sales.

Q. And that was in 1941? A. Yes.

But let us get this straight. I was on the record as sales manager, and Cameron Peck classified himself as a sales coordinator, and he considered him as on an equal basis with me, and would not pay any attention to my authority or any orders that I gave him. He worked on his own and has worked on his own ever since.

Q. Is he with the company today, do you know? A. Not to my knowledge.

Q. Was he with the company when you left in 1943? A. Yes, he was.

292 Q. Mr. Eggleston, during the period of 1940 to 1943, can you name the dairies operating in Chicago in

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relation to their size? A. Well, there was Bowman, Borden, Hawthorn-Mellody, Dean, Capitol, Western United.

Q. Did you know Francis H. Coleman? A. Francis H. Coleman?

Q. Yes. A. Yes, I do.

Q. Who was he? A. Francis H. Coleman was vice president of the Bowman Dairy Company, or is vice president.

Q. He was vice president at the time that we are talking about, from 1940 to 1943? A. Yes, he was vice president in charge of production.

Mr. Jinkinson: So that it may be understood, your Honor, that unless otherwise specified, the interrogation is in the period between 1940 and 1943.

Does the witness so understand?

The Witness: Yes.

The Court: Very well.

Do you understand that the period to be covered
293 is from 1941, when he became sales manager?

Mr. Jinkinson: Sales supervisor in 1940; from 1940 to 1943, which is the cut-off period, and when he left.

The Court: Very well. All questions I take it relate to that period.

Mr. Jinkinson: Yes.

The Court: Proceed.

By Mr. Jinkinson:

Q. What was Mr. Coleman's duty with the company, if you know? A. Why, Mr. Coleman was in charge of production, and he was on the sales committee, and he was on the finance committee, I believe, and he was on the advertising committee.

Q. Did you know Mr. Walter F. Kettel? A. Yes, I did.

Q. What was his position with the Bowman Company? A. He was manager of the central wholesale division.

Q. What were his duties, if you know? A. Well, everything pertaining to managing of the division, the hiring of employees, and looking after sales.

294 Q. And what part did the central wholesale division cover in the City of Chicago? A. Well, they covered the biggest part of Chicago, I would say from 22d Street north.

Q. The Loop district? A. Yes.

Q. Mr. Eggleston, were you acquainted with the officers of the Borden Dairy Company? A. Yes, sir.

Q. Did you know a Mr. Smaha? A. Yes, sir.

Q. Do you know what position he held with The Borden Company? A. At that time I believe Mr. Smaha was vice president.

Q. Did you know Mr. D. M. Koenig? A. Yes, I did.

Q. What position did he have with the Borden Dairy Company during that time? A. I believe Mr. Koenig was sales manager.

Q. Is that position similar to the one that you occupied with the Bowman Company? A. I would say yes, except that I did not have a coordinator.

295 (Laughter.)

Q. Do you know a Mr. H. H. Inglehart? A. I knew him to see him, but I was not very well acquainted with him.

Q. Do you know Mr. W. A. Baril? A. Yes.

Q. Do you know what position he occupied with The Borden Company? A. I believe he was vice president.

Q. Mr. Eggleston, between the years 1940 and 1943, did you have any conversation with anyone from The Borden Company relative to the formulation or the submitting of bids to the Great Lakes Naval Station at Great Lakes, Illinois?

Mr. Ball: May I have the question read, please?

The Court: The reporter will read it.

(Question read.)

Mr. Ball: I move that the witness answer that merely yes or no.

Mr. Jinkinson: You are not moving the witness to just answer yes or no.

The Court: The question calls for a yes or no.

296 By the Witness:

A. Between 1940 and 1943?

By Mr. Jinkinson:

Q. Yes, sir. A. The answer is no.

Q. Did you have any conversation with him at any time prior to 1940?

Mr. Ball: I object to that as outside the scope of the issues here.

Mr. Hart: Prior to what?

The Court: What is the objection?

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Mr. Ball: Outside the scope of the issues here.

The Court: Sustained.

Mr. Jinkinson: Your Honor, I think the Government will have to move to invoke the inflexible rule, as the court pointed out in his order, that we will have to go back and give the background to this matter before September, 1940, if possible.

The Court: I stated that if it has to do with the organization of either of these subsidiaries prior to 1940, which you seek to have these defendants divested of, that
297 I would permit testimony to be offered from 1940 on for that purpose, but for no other purpose, except that if it is within a month or two, I don't mean to hold you exactly to January 1st—What was the date, September?

Mr. Ball: September 16.

Mr. Jinkinson: September 16.

The Court: 1940, if you want to go back to January, 1940, it is all right. But September 16 is the cut-off here

Mr. Hart: I believe that is the way the question was framed, between 1940 and 1943, and the witness' answer was no.

The Court: That is correct.

Mr. Jinkinson: I will ask him for prior to that time.

The Court: To which I sustained an objection.

By Mr. Jinkinson:

Q. Did you have any conversation with anyone from The Borden Company relative to the submitting or formulating of any business with the Great Lakes Naval
298 Training Station at Great Lakes, Illinois, immediately prior to September of 1940? A. No, sir.

Q. Did you have a conversation with anybody from The Borden Company relative to the formulation or submission of any bids to the United States Army at Fort Sheridan, Illinois, between the years 1940 and 1943? A. No, sir.

Q. Mr. Eggleston, I asked you if you had a conversation with anyone in the dairy business, other than the Bowman Company, relative to the submission or formulating of bids to the Great Lakes Naval Training Center at Great Lakes, Illinois, or to the United States Army at Fort Sheridan, Illinois, between 1940 and 1943. A. No, sir.

299 Q. Mr. Eggleston, did you have any agreement with the Borden Company relative to the alternating of bids between the Bowman Dairy Company and the Bor-

den Dairy Company for the supplying or furnishing of milk to the Great Lakes Naval Training Center at Great Lakes, Illinois, between the years 1940 and 1943?

Answer the question yes or no. A. No.

Q. Mr. Eggleston, are you presently a stockholder in the Bowman Dairy Company? A. I tell you, a friend of mine bought—

Q. Answer the question yes or no. Are you a stockholder in the Bowman Dairy Company? A. I hold five shares of stock.

Q. All right. You are, then, a stockholder in the Bowman Dairy Company, right? A. For the past sixty days, yes.

Q. At the time you left the employment of the Bowman Dairy Company, were you a stockholder in the Bowman Dairy Company? A. At the time I left, yes.

Q. And did you own that stock for any period of
300 time thereafter? A. No.

Q. When did you sell it? A. At the time I left.

Q. And to whom did you sell it? A. It was turned back into the company.

Q. Now, when you left the employment of the Bowman Dairy Company did you have a contract with them relative to your future employment in the milk industry in the city of Chicago? A. Yes, sir.

Q. And for how long a period of time was that contract in effect? A. Oh, I think the first contract was about six years.

Q. And was it subsequently renewed? A. Yes.

Q. And do you presently have a contract with the Bowman Dairy Company relative to your activities on your part in the milk industry in the city of Chicago? A. Yes, sir.

Q. Mr. Eggleston, I hand you a document marked
301 Government's Exhibit No. 40 for identification, and ask you, can you state what that is? A. That is the contract I have with the Bowman Dairy Company.

Mr. Hart: State which one. I believe the witness said there were two.

Mr. Jinkinson: The present.

By Mr. Jinkinson:

Q. Is this the present contract? A. Yes, this is the present contract.

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Q. Did you sign the contract? A. Yes, sir.

Q. Signed by the Bowman Dairy Company, by whom? A. F. H. Cullman and Louis E. Metzger.

Mr. Jinkinson: The government offers in evidence Government's Exhibit No. 40.

The Court: I will reserve ruling on it until after cross examination.

Mr. Tierney: Will you state what bearing that has?

Mr. Jinkinson: I am trying to qualify the witness as a hostile witness.

Mr. Tierney: I don't admit that he is a hostile wit-
302 ness. There is no hostility that I see.

By Mr. Jinkinson:

Q. Mr. Eggleston, did you have a conversation in the office of the Anti-Trust Division on the 1st day of May, 1951, between yourself and Messrs. Faris and Harsha of the Anti-Trust Division? A. I cannot remember right at this time.

Q. Do you remember about the time? A. I know that they called me down there several times for a conversation.

Q. Did you ever tell Mr. Harsha or Mr. Faris that you had had a conversation with Mr. Koenig of the Borden Company in 1940 or 1941 relative to bids being rigged at Fort Sheridan, at the Army base at Fort Sheridan, Illinois, and at Great Lakes Naval Training Station?

Mr. Hart: I object to this as an attempt to impeach his own witness without any basis for it.

Mr. Jinkinson: Well, your Honor, the man is an employee of the Bowman Company and was during the time which I am interrogating him about. He was a presi-
303 dent or vice president of the company. He was on the board of directors, and he was in charge of the substantial activity or an activity in the company like the sale of fluid milk. He was manager of the entire company. He has made statements on many occasions which refute the statements I have just asked him, and I move for the privilege of cross examining him, and I also state to the Court and show your Honor the Exhibit No. 40 which shows that the witness is at this time receiving the sum of $6,000.00 a year from the Bowman Dairy Company and will continue to receive that amount until 1955.

The Court: Is there any opposition to the motion?

(No response.)

The Court: Very well, the motion is granted.

You may proceed to cross examine him.

Mr. Ball: The motion was made, and you asked if there was opposition to it, and we were silent.

304 The Court: That's right.

Mr. Ball: We object to granting the motion on the ground that we don't think a proper basis was stated for it, speaking for the Borden Company.

Mr. Hart: I thought you were calling upon the government to inquire if they had opposition.

The Court: No, I was calling on you for objections to the motion. He just made a motion. I assume the government wouldn't advance opposition to their own motion. I didn't say "the defendants," but I think it was implied.

Mr. Hart: Well, I think you caught the defendants asleep, if the Court please.

The Court: Very well, and if you are now awake I will hear what opposition you have to the motion.

Mr. Hart: It is based on the ground that we don't feel that sufficient groundwork has been laid to show this party is a hostile witness.

305 The Court: Are there any others?

(No response.)

The Court: The objection is overruled. You may proceed to cross examine the witness.

Mr. Jinkinson: I will strike the pending question.

By Mr. Jinkinson:

Q. And did you, Mr. Eggleston, ever tell Mr. Faris or Mr. Harsha that you had rigged bids with Mr. Koenig of the Borden Company on sales of milk to the United States Army at Fort Sheridan, and to the Great Lakes Naval Training Center at Great Lakes, Illinois?

Mr. Tierney: Just a minute. I object to that—

Mr. Jinkinson: Excuse me.

By Mr. Jinkinson:

Q. (Continuing) —between the years 1940 and 1943?

Mr. Tierney: I object to the form of the question as no proper way to lay a foundation to impeach the witness. There is no time set, and no place fixed.

306 The Court: I think the objection is well taken.

I have no objection to your asking the question, but you will have to state approximately the time, and who

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else, if anyone, was present, and whether or not it was taken down in question and answer form. If it was taken down in question and answer form, the only way you can impeach him is by asking him if he had heard that question and made that answer.

Now, if it was not taken down in question and answer form, then your general inquiry is proper, if you lay a foundation, which you have not yet done.

By Mr. Jinkinson:

Q. Mr. Eggleston, how many times were you called or did you come to the Anti-Trust Division office in Chicago? A. I can't remember.

Q. Was it more than once? A. Yes.

Q. Were you there on the 1st day of May, 1951, be-
307 tween the hours of 2:00 p.m. and 4:00 p. m. on Tuesday— A. I might have been.

Q. Do you deny that you were there at that time? A. No.

Q. Who was present at the interview that you had at the office, do you remember?

Mr. Hart: I object to that. Apparently Mr. Jinkinson is now trying to assume that, because the witness did not deny his presence, that he has admitted it.

The Court: Overruled.

By the Witness:

A. I cannot recall who was present.

By Mr. Jinkinson:

Q. Were Mr. Faris and Mr. Harsha, attorneys in the Anti-Trust Division office of the Department of Justice present on that day with you? A. If I remember correctly, I think it was Mr. Ford.

Q. Was Mr. Ford also with them, three of them? A. No, as near as I can recall, I think it was Mr. Ford and Mr. Harsha.

Q. You were there, Mr. Eggleston, on more than
308 one occasion? A. Yes.

Q. Mr. Ford, according to our records, saw you on January 12th, 1951. I am directing your attention to May of 1951. A. I cannot remember.

Q. You don't remember the conversation with Mr. Harsha and Mr. Faris at all? A. I don't remember Mr. Faris sitting in. I know Mr. Ford sat in.

Q. Do you remember on this particular date of May, 1951? A. I don't remember the dates.

Q. Do you remember Mr. Harsha being there? A. Yes.

Q. Do you remember having a conversation with Mr. Harsha with reference to the rigging of bids at the United States Army Center at Fort Sheridan, Illinois, and the Great Lakes Naval Training Station at Great Lakes, Illinois?

Mr. Ball: I object to the form of the question as including a characterization of a conversation.

The Court: Overruled. He may answer.

309 By the Witness:

A. I don't remember making any such statement that I was rigging bids in 1940 and 1941.

By Mr. Jinkinson:

Q. Or 1942? A. Or 1942.

Q. Or 1943? A. Or 1943, because Cameron B. Peck had taken over Highland Park and he handled those bids exclusively, and I was just ignored entirely. Since 1940 Cameron Peck handled those bids, and he handled those bids exclusively, and I had nothing to do with them. Prior to 1940 it was something else. I am talking about since 1940, and our records in the Bowman Dairy Company will show that Cameron Peck was the one that handled those bids, and I had absolutely nothing to do with it.

Q. Mr. Eggleston, I hand you a document marked for the purposes of identification as Government's Exhibit No. 41. Can you state what that is?

Incidentally, we have copies of these.

Your Honor, during the course of the examination of this witness I am going to be interrogating this wit-
310 ness with reference to some minutes of meetings of sales directors' meetings, and the government is interested in certain excerpts of those minutes which we have taken out and mimeographed, and I think you can follow the exact excerpts.

The Court: Very well.

What document does he now have?

Mr. Jinkinson: Not one of those, but he has had—

The Court: Well, is there a copy of what he has now?

311 Mr. Jinkinson: Yes, but if you will look at your schedule of June 17th, 1952, you will see that part in which we are interested.

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The Court: I see, June 17th.
Mr. Jinkinson: 1942, your Honor.
The Court: Very well, proceed.

By the Witness:

A. Well, this is a copy, I believe, of the Sales Committee meeting.

By Mr. Jinkinson:

Q. Of both the Bowman Dairy Company— A. Of the Sales Committee.
Q. Of the Bowman Dairy Company? A. Yes.
Q. And of which you are a member? A. Yes.
Q. And which you attended? A. Yes.

The Court: Do I have the right one? The one I have does not show that he was there. The one you gave me shows present Mr. D. Cameron Peck, E. J. Larson, and R. W. Buthman.

By Mr. Jinkinson:

Q. Did you receive a copy of this minute in the
312 course of your appointment with the Bowman Dairy
A. I might have.
Q. You might have? A. Yes.
Q. Have you ever seen this document before? A. I will tell you: Cameron Peck used to write up the minutes and about a week or ten days after the meeting was held he would lay them on my desk, and I would take them, put them in the drawer, or put them in my brief case.

Mr. Hart: I move to strike the answer.
The Court: It may be stricken. The question is, did you see a copy of these minutes before? Did you, or did you not? If you don't know, say so.

By Mr. Jinkinson:

Q. Isn't this the minute that you delivered to Mr. McConnell in the Dean case? A. I had some minutes in my brief case.
Q. And you don't know whether this is the one delivered? A. No, I don't.
Q. Is that your handwriting across the top? A.
313 No, sir.

Mr. Jinkinson: The Government offers in evidence Exhibit No. 41.

The Court: Give the original to the defendants, and I will hear them on it after the witness has finished his testimony.

Mr. Hart: We have just excerpts. Is this No. 41?

Mr. Jinkinson: Government's 41.

Mr. Hart: Under date of what?

Mr. Jinkinson: June 17, 1942.

Mr. Hart: I object to its introduction.

The Court: Well, we will hear you after the witness finishes. I said I wouldn't hear their objections until after you were through.

Mr. Jinkinson: I am sorry.

The Court: You go right ahead.

By Mr. Jinkinson:

Q. Mr. Eggleston, I direct your attention to paragraph 3 of Government's Exhibit No. 41. Will you read that, please?

Mr. Hart: May I suggest to the Court that there is something in the air that makes the hearing rather
314 difficult here today, and I couldn't even hear Mr. Jinkinson's question.

The Court: Do you want to put the question again, or to put the fan on?

All right, put the fan on.

Mr. Hart: There is a deadness here, and we are having difficulty in hearing.

The Court: Well, as long as it is not the Court that is dead.

(Question read.)

By Mr. Jinkinson:

Q. Just read it to yourself.

Mr. Eggleston, where was the headquarters of the Borden Dairy located? A. I believe on Broadway, 36—

Q. On the north side of Chicago? A. Yes.

The Court: The headquarters of which?

The Witness: Borden.

315 By Mr. Jinkinson:

And were they referred to you frequently as the North Side people? A. I don't remember of anybody referring to any—when we talked about the Borden Company, we always mentioned them by name. I was not present at that meeting. I was out of town.

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Q. You have read the Paragraph 3, have you not? A. I read it now, yes.

Q. And Mr. Peck states that he is going to arrange a meeting for you and Mr. Peck with the North Side people early next week. Isn't that what the document says? A. That is what it said.

Q. Now, was that meeting arranged? A. Not to my knowledge.

Q. You don't remember it? A. No, sir.

Q. And have you ever had any meetings with the Borden Company, with Mr. Kuehne, Mr. Baril—

Mr. Ball: The name is Baril.

Mr. Hart: I object to that unless it is limited to after September 16.

The Court: You want to relate it to this minute,
316 in any event?

Mr. Jinkinson: Yes, sir.

The Court: Do so.

Mr. Jinkinson: If counsel will permit me to finish the question.

Mr. Hart: I am sorry.

Mr. Jinkinson: I will strike the question and reframe it in this manner.

By Mr. Jinkinson:

Q. Mr. Eggleston, did you have any meeting with Mr. Kuehne, Mr. Baril, Mr. Smaha, Mr. Englehardt of the Borden Company shortly after June 17, 1948, that you recall? A. No, sir.

Q. Mr. Eggleston, who are the North Side people? A. I don't know, you will have to ask Cameron Peck who he was referring to.

Q. Mr. Eggleston, you stated, I believe, that you had some copies of minutes of meetings of the Sales Committee meeting of the Bowman Company, is that right? A. I did have some.

Q. What did you do with it? A. I had them in my brief
case, and I left my brief case in McConnell's office
317 one day while they were taking my deposition, and
when I come out the minutes were gone.

Q. Were you interrogated about these minutes at the deposition taken in the Dean case? A. Yes, sir.

Q. Were these minutes shown to you then? A. Yes, sir.

Q. And were they marked as exhibits then, do you know? A. Yes, sir.

Q. And the marking at the top of the document, No. 42

marked for identification, is that where they were marked as an exhibit in that case? A. I wouldn't know.

Q. You wouldn't know? A. No.

Q. But these were shown to you, and you were interrogated with reference to them at the taking of your deposition in the Dean case? A. That is right.

Q. Now, I show you a document marked Government's Exhibit—

Mr. Hart: Just a moment. If the Court please, I
318 object to Mr. Jinkinson's question as assuming, and the witness has not yet identified them, that these are the minutes that were shown to him at that time. His question says, "You were shown these at that time."

By Mr. Jinkinson:

Q. Mr. Eggleston, I hand you a document marked Government's Exhibit No. 42 for identification. Can you state what that is?

The Court: The other objection is sustained, unless you show them to him. Are you going to do them one at a time?

Mr. Jinkinson: Yes.

The Court: All right.

By the Witness:

A. All the minutes of the Sales Committee meetings were signed at the bottom, H. C. Eggleston, Sales Manager; D. Cameron Peck, Coordinator; Mr. Larson, and Mr. Buthman.

I don't recall ever receiving a Sales Committee meeting, the minutes of a Sales Committee meeting, without being signed in that order.

319 By Mr. Jinkinson:

Q. Do you deny that this is the minute that was in your possession? A. And I am positive that any minutes that I had in my brief case at that time were all signed by the Sales Committee, H. C. Eggleston, Sales Manager; D. Cameron Peck, Coordinator; and Mr. E. J. Larson, and Mr. Buthman.

Mr. Jinkinson: Now, I move to strike the answer, your Honor, as not being responsive to the question.

The Court: It may be stricken.

Mr. Jinkinson: Now, will you read the question, Miss

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Reporter? And I would like to have you answer it, Mr. Eggleston.

(The question was read by the Reporter as follows:

"Q. Do you deny that this is the minute that was in your possession?")

By the Witness:

A. I don't know.

By Mr. Jinkinson:

Q. Do you deny that it was? Do you admit it is
320 or not? Which? State whether it is or not. A. I don't know. The minutes that were handed to me were all signed.

Mr. Jinkinson: All right. You have answered the question.

Mr. Tierney: Let him answer the question.

Mr. Jinkinson: He has already answered it.

The Court: You will have an opportunity to cross examine.

Mr. Jinkinson: Your Honor, I suppose the Government can do it the hard way. These are the minutes we got from Mr. McConnell yesterday. We can put him on the stand—

Mr. Ball: We would be very glad to have you do that.

Mr. Jinkinson: What was that?

Mr. Ball: We would be very glad to have you do that.

Mr. Hart: They have never been introduced into anything. They were just marked as exhibits for identification.

321 Mr. Ball: Mr. Jinkinson, is that the copy of the Eggleston deposition in your hands?

Mr. Jinkinson: It is, Mr. Ball. It is.

Mr. Ball: If the Court please, counsel has said that he has in his mind a copy of the deposition taken in the Dean case, which was the subject of the Court's ruling yesterday. I object to that being in the possession of counsel.

The Court: As far as its being in his possession, I don't propose to go into it.

Insofar as he is going to use it in asking any questions here, I certainly am going into it. Thus far there is nothing before me.

Apparently, there are various ways of getting many things around here. The witness just said the minutes disappeared from the brief case.

Mr. Hart: If the Court please, just a word of explanation about this deposition, which I think will make
322 our position about these documents a little more clear.

At the time the deposition was taken, all the defendants refused to cross examine on the basis of the fact that the deposition was not properly taken. So there is not the usual background of our objecting to these documents, or having had an opportunity to question anybody about them.

The Court: I disposed of the deposition matter yesterday. There is nothing before the Court.

Mr. Hart: Perhaps you ought to know that portion of it.

Mr. Jinkinson: Your Honor, I don't know whether you want to go into it now, but I am going to go into the deposition.

The Court: You will not use the deposition here. I ruled on that yesterday.

Mr. Jinkinson: I would like to be heard upon the matter.

323 The Court: No, I heard you yesterday and at length. I have ruled upon the matter, and you proceed with your evidence.

Mr. Jinkinson: Your Honor, there has been a change in the depositions since then.

The Court: I heard all argument on both sides yesterday, and ruled on the Eggleston deposition. The ruling will stand. Proceed with your evidence.

Mr. Jinkinson: Your Honor—

The Court: I will hear no further argument on that point from either side.

Mr. Jinkinson: Your Honor, the Dean depositions have been opened. They were sealed yesterday, and they have now been opened.

The Court: I will hear no further argument on the proposition. I have ruled on it. Will you please proceed with your case.

By Mr. Jinkinson:

Q. Mr. Eggleston, did you attend a meeting of the
324 Sales Committee of the Bowman Dairy Company, on Tuesday, August 11, 1942, held at the Head Office? A. Held at the Head Office?

Q. Of the Bowman Dairy Company? A. I don't recall.

Q. Do you recall that you and Mr. D. Cameron Peck, and Mr. Buthman held a Sales meeting on that date? A. At the Head Office?

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Q. That is right. A. The Sales Committee meetings were never held at the Head Office.

Q. At what office were they held? A. North Division.

Q. Did you attend a meeting at the North Division Office on that day? A. We had a meeting on the average of once a week, or once every two weeks. It is hard for me to remember just what date I did attend the meetings.

Q. Do you remember at any meeting, Sales Committee meeting, where Mr. Buthman discussed the milk business at the Great Lakes Naval Training Center? A. I don't remember now. I can't remember everything that was discussed at those meetings.

Q. Well, was the securing of your share of the busi-
325 ness at the Great Lakes Naval Training Center ever discussed by you and Mr. Buthman, or you and Mr. Peck, or any other employee of the Bowman Company? A. Mr. Peck would not discuss anything with me relative to Great Lakes, or Fort Sheridan, since 1940. I repeated that time and time again.

Q. You deny, then, that you ever had a conversation with him relative to it? A. With Mr. Peck?

Q. Yes, relative to it. A. Yes, sir, I will.

Q. You never had a conversation at any time? A.
326 Not with Cameron Peck.

Q. Mr. Eggleston, I hand you a document marked Government's Exhibit 43. Will you state what that is?

The Court: What date is this?

Mr. Jinkinson: It is dated April 8, 1942.

The Court: Thank you.

The Witness: Your Honor, may I make a statement?

The Court: Answer the question.

By the Witness:

A. This is not a copy of the sales committee meeting that was taken out of my brief case.

By Mr. Jinkinson:

Q. It was not? A. No, sir.

All the minutes was turned over to Mr. McConnell, was signed H. C. Eggleston, Chairman, D. Cameron Peck, Coordinator, E. J. Larson, and Mr. Buthman.

Those are all copies.

Mr. Jinkinson: Your Honor, I see Mr. McConnell here in the court room. May I have this witness stand
327 aside for a minute while I interrogate—

The Court: Certainly.

Mr. Jinkinson: —Mr. McConnell on the production of these documents?

The Court: Certainly.

Mr. Jinkinson: Will you step aside, Mr. Eggleston?

(Witness withdrawn.)

Mr. Jinkinson: Mr. McConnell, will you step forward, please?

Mr. McConnell: I should have stayed in my office where I belong.

The Court: You had better stay here for a while.

You may proceed.

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328 THOMAS C. MCCONNELL, a witness, recalled on behalf of the Government, having been previously first duly sworn, was examined and testified further as follows:

Direct Examination by Mr. Jinkinson:

Q. Mr. McConnell, you have previously been sworn in this matter, I believe. A. Yes, I have.

Q. And a subpoena duces tecum was served upon you for the production of certain documents? A. Yes, sir.

Q. And you responded yesterday morning by returning and submitting to the Government certain alleged minutes of sales committee meetings that had been in your possession, is that right? A. Yes, sir.

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By Mr. Jinkinson:

Q. Mr. McConnell, I will ask you this question:

Was the deposition you took of Mr. H. C. Eggleston in the case of the Dean Milk Company v. the American Processing Sales Company, Inc., sealed? A. Yes, sir.

Q. Before you opened that deposition? A. I directed that it be opened. I don't know whether it was opened. But I directed that it be opened on my client's permission yesterday afternoon.

Mr. Ball: I move to strike the answer and interpose an objection to the question on the ground that it is going into a matter that is not properly a part of the examination of this witness.

The matter has been ruled upon by the court; in fact, it has no relevance to the matter before the court.

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The Court: The motion is granted. The answer will be stricken.

Mr. Jinkinson: Your Honor, the Government would
330 like to make a proffer of proof by this witness that subsequent to the court's ruling yesterday morning concerning the deposition of H. C. Eggleston, taken in the matter of the Dean Milk Company v. the American Processing Company, Inc., that subsequent to that ruling and subsequent to the testimony of Mr. McConnell, who was then a witness before this court, with reference to the production of certain documents called for in the subpoena duces tecum, that Mr. McConnell, who was the attorney for the Dean Milk Company, conferred with his client and secured the permission of the Dean Milk Company to open the deposition then pending in Case No. 49 C 1159, that is, the deposition of H. C. Eggleston; and that pursuant to the rules of practice of this court, Mr. McConnell directed the deposition to be opened, and it was opened.

The Court: I then took it that Mr. McConnell and his client, the Dean Milk Company, have overruled this
331 court and Judge Igoe.

Mr. Jinkinson: No, sir, your Honor.

The Court: Your statement will be stricken from the record, and I think that the matter should be referred to Judge Igoe for whatever action he cares to take in the nature of a complaint for contempt.

Mr. Jinkinson: Your Honor, I call the court's attention to the order of Judge Igoe—

The Court: I care to hear nothing further on this matter. I have ruled. I will hear nothing further on this record. Our record in the matter is clear. I have heard everything that was before the court at the time it was presented.

I will not have the Government bring up before the court matters that have been previously ruled upon.

You may proceed.

Mr. Jinkinson: That is all, Mr. McConnell.

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H. C. Eggleston, a witness, called on behalf of the Government, having been first duly sworn, resumed the witness stand, was examined and testified further as follows:

Direct Examination by Mr. Jinkinson (Continued):

Q. Mr. Eggleston, who drafted the minutes of the meeting of the sales committee meetings of the Bowman Dairy

Company while you were the vice president? A. I was never vice president.

Q. Of the Bowman Dairy Company? A. No, sir.

Q. What were you? A. I was sales manager.

Q. You never were the vice president? A. No, sir.

Q. Well, when you were the sales manager, then,
333 who drafted the minutes of the sales committee meetings? A. D. Cameron Peck.

Q. And were copies made of those minutes? A. Mr. Peck would make a copy for each member of the sales committee.

Q. And were those copies delivered or distributed to each member of the sales committee? A. They were laid on his desk.

Q. And was one laid on your desk, a copy of each meeting of the sales committee? A. I would say yes.

Q. Now, Mr. Eggleston, I hand you a document marked Government's Exhibit No. 43 for purposes of identification. Is that a copy?

The Court: What is the date of that one Mr. Jinkinson?

The Witness: It is dated March 23, 1951.

By Mr. Jinkinson:

Q. Is that a copy of the sales committee meeting laid on your desk, and which you received in the course of business? A. I would say yes.

334 Mr. Jinkinson: The Government offers into evidence Exhibit No. 43.

The Court: Very well. Do you want to be heard on it? There is one.

Mr. Jinkinson: I thought that we were going—

The Court: We will be heard on all of them at the end of the witness' testimony.

Deliver it to the defendants.

Mr. Tierney: What date is that, Mr. Jinkinson?

Mr. Hart: Is that one that we have?

The Court: March 23, I think you said.

Mr. Jinkinson: April 8, 1942, is that the one?

Mr. Hart: That is 1943?

Mr. Jinkinson: 1942.

The Court: April 8?

Mr. Jinkinson: April 8, 1942.

The Court: Oh, you were reading the date that was stamped on it: "March 23"?

Mr. Jinkinson: Yes, that is what I meant.

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Mr. Hart: The date of the meeting is April 8,
335 1942?

The Court: Yes, I have that.

By Mr. Jinkinson:

Q. Now, directly your attention to Government's Exhibit No. 43, it states that you were present at the meeting on that date, is that true? A. Correct.

Q. And were you at that meeting? A. If it is stated on the minutes, I was, yes.

Q. Now, did you hear any conversation or any discussion during the meeting of a possibility of Ridgeview submitting a bid for Fort Sheridan, or the United States Army Post at Fort Sheridan, Illinois? A. I can't remember everything that was discussed at those meetings.

The Court: Answer the question.

The Witness: I stated I could not remember.

The Court: Proceed.

By Mr. Jinkinson:

Q. Mr. Eggleston, was Ridgeview a subsidiary of the Bowman Dairy Company? A. Yes, sir.

Q. And how long had it been in existence? A. I believe since about 1938 or 1939.

Q. And it was a subsidiary in April of 1942, it was
336 still a subsidiary, right? A. That is correct.

Q. I direct your attention to paragraph 19 of Government's Exhibit No. 43, and ask you to read that. A. You want me to read it aloud?

Q. No, I just want you to read it. Have you read it? A. Yes.

Q. Does that refresh your memory as to any discussion that might have occurred at that meeting? A. It might have, yes.

Q. Well, what was the discussion. You say that it now refreshes your recollection. What was the discussion that occurred at that meeting concerning Ridgeview submitting a bid for the United States Army Post at Fort Sheridan, Illinois? A. I can't remember of everything that was discussed at those meetings.

Q. Do you remember whether or not Ridgeview did submit a bid? A. No, I do not. That was handled strictly by Cameron Peck.

Q. Mr. Eggleston, from September of 1940, to the time you left the employment of the Bowman Dairy Com-
337 pany, you had the responsibility for the formulating and submission of bids on institutional business for the Bowman Dairy Company.

Now, when I say institutional business, I mean army posts, navy camps, and the Cook County Jail, and like institutions. A. Some was handled by D. Cameron Peck. Some was handled by Mr. Kettell. Some was handled by Mr. Block at the Forest Store Division, and I believe some was handled by Mr. Curtin at the Elston Store Division.

Q. Did you have any responsibility for the submission of bids to any of these institutions? A. If I remember correctly, Mr. Cameron Peck sent out a letter to all the Divisions directing them to send the bids into the Head Office, and he handled the bids direct there himself.

Q. The question is, Mr. Eggleston, did you have any responsibility or duties in connection with the submission of bids? A. No, sir.

Q. None whatsoever? A. No, sir.

Q. Mr. Eggleston, I hand you document marked
338 Government's Exhibit 44 for identification. Can you say what that is? A. It is the Sales—it is a report of the Sales Committee meeting.

Q. For the month or date of December 16, 1941, is that right? A. That is correct.

Q. Now, directing your attention to paragraph 14 thereof, I ask you to read that. A. Yes.

Q. Now, this exhibit, Government's Exhibit 44, states that you made a report on the award of the bid at the County Hospital. Did you make such a report? A. At the County Hospital?

Q. Right. A. Doesn't paragraph 14 state Fort Sheridan?

Q. Right. A. I didn't read the County Hospital there. Let me look at it.

Q. Yes. (Handing document to witness.) A. That is correct.

Q. Now, if you had nothing to do with the institutional bidding, why were you making a report of its award?
339 A. Mr. Kettell came upstairs and told me that they had been awarded the bid of the County Hospital.

Q. Is that the only connection you had with it? A. That is correct.

Q. What did you report to the meeting on that occasion? What was your report? A. Just as I stated in the meeting, that Mr. Kettell had told me that we had received the bid of the County Hospital.

Q. Now, Mr. Eggleston, I ask you to read paragraph 14 again, and state wherein it says that Mr. Kettell told you that you had received the bid? A. "Mr. Eggleston

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reported that we have received an award of the bid of the County Hospital."

Mr. Hart: This seems to be largely argumentative.

The Witness: I got the information from Mr. Kettell, and I reported it to the Sales Committee, that we had obtained the business of the County Hospital.

Mr. Hart: I withdraw the objection.

The Court: Very well.

By Mr. Jinkinson:

Q. It says nothing in Exhibit 44 that Mr. Kettell
340 told you? A. No.

Q. Mr. Eggleston, reading to you from a memorandum prepared by Mr. E. Huston Harsha of the Antitrust Division Office concerning an interview, or an alleged interview you had with Mr. Harsha and Mr. Faris on May 1, 1951, for the purpose of refreshing your recollection, I read as follows:—

Mr. Ball: May I have the question read to this point?

Mr. Jinkinson: There is no question yet.

The Court: As much as he has asked, it may be read.

(The record was read by the Reporter as requested.)

Mr. Ball: Defendants object to any reading of this report as not proper, and an attempt improperly to introduce something into the record that is not a proper addition to the record.

The Court: Objection sustained.

By Mr. Jinkinson:

Q. Mr. Eggleston, was the Ridgeview Company or-
341 ganized by the Bowman Dairy Company? A. We bought out the Radcliffe Dairy when it was operating in Evanston, and we operated it under the name of, I think, the Radcliffe Brothers, and later on we changed it to Ridgeview Farms.

By Mr. Jinkinson:

Q. Did you form that company for the purpose of using it as a fighting company?

Mr. Ball: I object to the question as calling for an opinion and conclusion of the witness, and invading the province of the Court as finder of fact, and the question is ambiguous.

The Court: Objection overruled. He may answer if he knows.

By the Witness:

A. We bought out the Radcliffe Dairy to find out their method of operation, and in order to have a company that we could compete with the competition.

By Mr. Jinkinson:

Q. Did you ever designate it as a fighting company? A. I might have, inferring that we were going to use it to meet competition, yes.

Q. At the time the Ridgeview Company was formed, were you engaged at that time in a price war? A. At the time it was formed?

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Q. Yes. A. No, sir.

Q. Were you engaged in a price war with any dairy concerning cutting of prices, or taking Bowman's accounts? A. I believe we were, back in 1938 or 1939.

Q. That is about the time Ridgeview was formed, was it not? A. Yes, that is correct.

Q. Will you tell the Court the purpose of the formation of the Ridgeview Company? A. There was a number of milk companies around Chicago operating on a strictly distributor basis, which at that time we called vendors. They bought their own truck, purchased the milk, and went out on the street. They didn't belong to the Union. They bought their milk on the open market, and that was the type of competition that we had to compete with.

The Union at that time would not allow us to put on vendors at any of the Bowman plants, and in order to find out how these fellows were able to go out and sell milk from five to six cents a quart below us, we purchased

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the Radcliffe Brothers, who were operating in Evanston strictly as a vendor company, and we found things there, and we found out the reason why they were operating, and we purchased that in order so we will have a company that we could operate on the same basis as our competition like Meadowmoor, and Lake Valley, and a few more of them around the City of Chicago.

Q. Was Meadowmoor at that time engaged in that particular type of competition with you? A. Yes, sir.

Q. That is about the time the Ridgeview Company was formed? A. That is correct.

Q. Now, did you discuss the formation of the Ridgeview Company with the Borden Company, or anyone connected

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vith the Borden Company? A. I think back in 1938 or 939, at the time we purchased the Ridgeview Dairy, I be-ieve I did.

Q. And who did you discuss it with? A. I think it was Ir. Baril. I believe it was the early part of 1939.

Q. Did you discuss it also with Mr. Smaha? A. I don't recall whether Mr. Smaha was present or whether 44 it was Mr. Kuehne.

Q. Did you reach an understanding and agreement etween yourself and Mr. Smaha and Mr. Baril, or Mr. Baril of the Borden Company, that the Ridgeview Com-pany would not be used against Bordens?

Mr. Ball: I object to the question as calling for an opin-on and conclusion of the witness, and invading the prov-nce of the Court as finder of fact, the conversation not eing detailed, as to what was said and what was done. And I call your attention further to the fact that the party, Ir. Baril, who was named, is stated in the pretrial order o be deceased. And the time and the date not fixed.

The Court: Objection sustained.

By Mr. Jinkinson:

Q. Did you discuss the use of the Ridgeview Company vith Mr. Smaha and Mr. Baril? A. I believe I told them hat we were going to use that strictly as a vendor com-pany, and operate as strictly vendors at that time.

Mr. Ball: Move to strike the answer, as the time and place of this conversation were not given.

45 By Mr. Jinkinson:

Q. Where did this conversation take place?

The Court: He may state it now.

The Witness: The time?

By Mr. Jinkinson:

Q. Where did it take place? A. I believe I met him at ne of the labor negotiation meetings, if I remember cor-ectly.

Q. And about what time? A. Oh, some time in 1939.

The Court: Who was present?

By Mr. Jinkinson:

Q. Who was present? A. I know Mr. Baril was. I can't emember whether Mr. Smaha or Mr. Kuehne were. I now someone was with him at that time.

Q. What was the conversation between you and Mr. Smaha and Mr. Baril of the Borden Company?

Mr. Ball: I object to the question. The witness has stated that Mr. Baril was there, but he has not stated for certain as to whether any of the other gentlemen now presently alive were present.

346 The Court: Add to that the other names.

Mr. Jinkinson: Mr. Smaha.

The Court: Mr. Smaha?

By the Witness:

A. Sometimes Mr. Kuehne would attend the labor meetings, and sometimes Mr. Smaha.

By Mr. Jinkinson:

Q. Was that the only time you saw anyone from the Borden Company was at labor meetings? A. Most often that is where I would meet them.

Q. Did you ever meet them at the Plaza Hotel or lunch? A. No, I never had lunch at the Plaza Hotel in my life.

Q. Did you ever meet these men, either Mr. Smaha or Mr. Baril or Mr. Kuehne, at the Brevoort Hotel for lunch?

Mr. Ball: I object to it unless a time is shown.

By Mr. Jinkinson:

Q. Between the years 1940 and 1943?

The Court: You may answer.

347 By the Witness:

A. Since 1940?

By Mr. Jinkinson:

Q. Yes, between 1940 and 1943, the time you left the Bowman Company? A. No, sir.

Q. At the time that you met or saw Mr. Kuehne and Mr. Smaha at the labor meetings you referred to, and discussed the Ridgeview Company, did you also discuss with them the formation of Belmont by the Borden Company?

Mr. Ball: I object, unless it is shown which conversation this was, and to which exact representative of the Borden Company.

The Court: He may answer whether he had such a conversation or not, first, and then if he did, you will have to lay the foundation before I will hear the conversation.

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The question was, did you ever have such a conversation?

By Mr. Jinkinson:

Q. Just answer Yes or No. A. About them form-
348 ing a company?

Q. That is right. A. I had nothing to do with them forming the company.

Mr. Jinkinson: Answer the question. I move to strike the answer as not being responsive.

The Court: It may be stricken.

The question is, Did you ever have a conversation with them about it. The answer is Yes or No, if you know.

By the Witness:

A. Yes, I believe I did.

349 Q. Where did the conversation take place? A. I believe it was at one of these labor meetings.

Q. And about what time? A. I would say somewhere in 1939.

Q. And who was present? A. Well, I know Mr. Birel was there. Now, whether it was Mr. Smaha or Mr. Koenig, I don't know.

Q. What was said between you and whoever was present for the Bowman Company with reference to the formation of the Belmont—

Mr. Ball: That is objected to until the identity of whoever was present for the Borden Company is fixed.

The Court: Overruled.

By the Witness:

A. I believe I told them that they were going to use Ridgeview strictly as a distributor company and operate it exclusively with vendors in order to meet such competition as Meadowmoor and Lake Valley, and they mentioned at that time that they were considering very seriously of doing something along the same line.

By Mr. Jinkinson:

350 Q. Did the name Belmont come up at that discussion? A. I can't remember whether they told me they were negotiating to buy out the Belmont Dairy at that time or not.

Q. Was any agreement reached between you and Mr. Smaha?

Mr. Ball: That is objected to as calling for an opinion and conclusion of the witness and invading the province—

Mr. Jinkinson: I am trying to examine this man—

The Court: Whether there was an agreement or not, it is a matter of a conclusion for the Court. If you want to bring out some conversation, do so.

Sustained.

By Mr. Jinkinson:

Q. Mr. Eggleston, I show you a document having been marked Government's Exhibit No. 45 for identification, and ask you if that is not your signature. A. That's correct.

Q. And do you remember signing this document,
351 this Exhibit No. 45, on or about the 29th day of January, 1951? A. Yes.

The Court: What is the answer?

The Witness: Yes.

By Mr. Jinkinson:

Q. Mr. Eggleston, can you state what Government's Exhibit No. 45 is? A. It is a statement I gave to Mr. McConnell.

Q. Is it an affidavit or a statement? A. Well, it is an affidavit, yes.

Q. And sworn to before a Notary Public? A. That is correct.

Q. Now, directing your attention to page 4, does that refresh your memory, at the bottom of the page, the last paragraph, and continuing on to page 5?

Mr. Tierney: We don't have a copy of that.

Mr. Jinkinson: Mr. Ball and counsel for the defendants had seen it this morning.

Mr. Ball: Yes, I saw it.

Mr. Hart: If the Court please, my—

The Court: I cannot hear both of you.

Mr. Hart: I beg your pardon.

352 The Court: Which one wants to talk first?

Mr. Hart: Not that I want to, but I will.

If the Court please, I have read hastily, over Mr. Ball's shoulder this morning, and a great many of the statements in there are in the same conclusive form in which Mr. Jinkinson framed his last question, to which we objected, and we want to object to the use of those conclusions therein, and in the same way as the question is written.

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The Court: I take it he is using it for the purpose of impeachment, isn't that your purpose?

Mr. Jinkinson: That's right, your Honor.

The Court: And is this affidavit that was presented yesterday in accordance with the subpoena?

Mr. Jinkinson: Right.

The Court: The objection is overruled.

By Mr. Jinkinson:

Q. Have you read the— A. Yes.

Q. Now, does that refresh your memory as to any
353 conversation between you and Mr. Smaha or Mr. Koenig and Mr. Birel at the time of the discussion when formation of Ridgeview and Belmont was discussed by you men? A. Yes.

Q. And what was said? A. I told Mr. Birel or Mr. Koenig or Mr. Smaha, whoever was with him, that we were organizing that company to meet competition and to fight that type of competition, and it was not being organized to go out and start a price war and cut their prices or anything of the kind, and they said if they went through and organized the Belmont Dairy, that that would be their object in organizing, in order to go out and meet the vendor type of competition and not be used against our company or anyone else.

Q. And Ridgeview would be used against Borden? A. No, the understanding we had was that we would not use Ridgeview to go out and start a price war against the Borden Company, and they said if they went through with the proposition on Belmont that they would use it strictly to fight vendor competition and to meet the vendor competition.

Mr. Ball: I move to strike out the answer of the
354 witness as to what the answer was, being the witness' opinion and conclusion as to the result of the conversation previously alluded to him in greater detail, a statement of a conclusion.

The Court: The motion denied.

By Mr. Jinkinson:

Q. Did you ever use Ridgeview against the Borden Company in any price war? A. Not while I was there.

Q. Did Borden ever use Belmont against the Bowman Company while you were there, to your knowledge?

Mr. Ball: That is objected to as ambiguous, and not stated what counsel means by "using it" against the other

company, and it is calling for an opinion and a conclusion of the witness.

The Court: Well, you will have an opportunity to cross examine him.

Overruled.

355 By the Witness:

A. I know that the Bowman Company lost stops to the Belmont Dairy.

By Mr. Jinkinson:

Q. On occasion, or frequently? A. On occasion.

Q. And did the Belmont lose stops to Ridgeview on occasion, to your knowledge? A. I stated that the Bowman Dairy Company lost stops to Belmont.

Q. And did the Ridgeview gain stops from Borden? A. That is something I couldn't answer. I don't know.

Q. Was the Ridgeview Company operated at a loss, Mr. Eggleston? A. That I wouldn't know. I had nothing to do with the financial statements.

Q. Mr. Eggleston I hand you a document marked Government's Exhibit No. 46 for the purpose of identification, and ask you if you will state what that is? A. That is the minutes of the sales committee meeting.

The Court: Of what date?

356 The Witness: October 2, 1941.

By Mr. Jinkinson:

Q. And was that the meeting which you attended? A. Yes, sir.

The Court: Is this 1946, you say?

The Witness: 1946, yes.

By Mr. Jinkinson:

Q. I direct your attention to the paragraph 17 of Government's Exhibit No. 46.

Mr. Hart: If the Court please, may I clear up one thing in connection with this? I apparently don't understand it. As I understand it, this witness has denied that these are the material he furnished Mr. McConnell.

The Court: He has not answered as to this one. He answered only as to one or two that he was previously asked about.

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Mr. Hart: The question was phrased, Is this a copy of it? Now, do you intend to phrase it, Is this a copy of the original?

By Mr. Jinkinson:

Q. Is this a copy of the original minutes? A.
357 Yes.

Q. Of the meeting which you attended? A. I would say yes.

Q. And did that Exhibit No. 46 come to your desk in the course of business of the Bowman Dairy Company? A. I would say yes.

Q. And was that a paper. the Exhibit No. 46, was that turned over to Mr. McConnell by you? A. Mr. McConnell said this was what I had in my briefcase when it was opened in his office; I would say yes.

Q. Now, reading paragraph 17, and you attended the meeting, was the discussion at that meeting—was there a discussion with reference to a loss by Ridgeview? A. I don't remember that discussion. It was in the meeting. Mr. Larson probably brought it up. It was in the minutes.

Mr. Ball: I object to the question and move to strike the answer for the reason stated in the objection, that the question misread the statement because the statement in the minutes refers only to a loss on retail routes of
358 Ridgeview and does not refer to a loss of the Ridgeview.

The Court: In view of the answer, the motion is denied. The question and answer are clear.

By Mr. Jinkinson:

Q. Was there a discussion at the meeting on October 2, 1941, between those attending the meeting—was there a discussion with reference to the loss by Ridgeview of $1,100.00 per month on routes operated by Ridgeview?

Mr. Hart: I object to that. As it appears here it has to do with retail routes.

The Court: Yes, we are concerned largely with wholesale business here.

Q. Is it your contention that this goes to prove the charges in the complaint with reference to the company which you seek to divest under the defendant's setup?

Mr. Jinkinson: I will withdraw the question.

By Mr. Jinkinson:

Q. Was Ridgeview vendors classified as retail sales or as wholesale sales while you were there? A. They
359 were retail vendors and wholesale vendors.

Q. Do you know what percentage of Ridgeview sales were sold to retail vendors and wholesale vendors? A. Offhand I would say no, I don't remember what they were.

Q. Do you know whether or not the discussion held at the sales committee meeting had reference to wholesale vendors or retail vendors? A. If I recollect, it was in regard to retail vendors exclusively.

Q. Did Ridgeview operate retail routes on house-to-house delivery? A. Not retail routes. They were operated by a vendor system of distribution. The vendor owned his own route and purchased the bottled goods from the Ridgeview Farms.

Q. Did Ridgeview actually operate any retail routes? A. Not while I was there.

Q. What were the majority of their sales made to, wholesale or retail customers? A. I cannot answer that. I don't know.

Q. Was Meadowmoor a retail operation in the m- business in Chicago? Did they operate retail routes?
360 A. I believe they did at one time.

Q. Were they operating retail routes when Ridgeview was formed? A. I wouldn't know.

Q. Wasn't it a fact, Mr. Eggleston, that Meadowmoor was largely a wholesale operation? A. Yes, I would say they were.

Q. Now, you organized the Ridgeview Company for the purpose of fighting the wholesale competition of Meadowmoor, isn't that right? A. We didn't organize the Ridgeview Dairy. We purchased a dairy that was operating under a vendor system of distribution at that time.

Q. You purchased it at that time, isn't that right? A. That's right.

Q. And you purchased it for that purpose? A. We purchased that in order to meet the vendor competition.

Q. Of the Meadowmoor Company? A. And operated business with non-union drivers and non-union employees in the plant, and going out and buying their milk on the open market and selling it at any price they could get.

Q. Did you subsequently cease directing the activi-
361 ties of the Ridgeview towards the Meadowmoor Dairy Company?

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Mr. Ball: That is objected to as assuming something that the witness has not answered. The question assumes they directed it towards the Meadowmoor.

The Court: Sustained.

By the Witness:

A. We didn't direct it against anybody in particular. These vendors went out and took a stop from us we—

The Court: The answer may be stricken. There is no question.

I sustained an objection to the question.

Mr. Jinkinson: Well, I move to strike the answer as being a voluntary statement of the witness.

The Court: I have already stricken it.

By Mr. Jinkinson:

Q. Mr. Eggleston, is it a fact that from time to time, that is between 1940 and 1943, you and other members of the sales committee of the Bowman Company discussed the question of having Ridgeview submit bids to
362 public institutions for the sale of milk? A. I cannot remember whether that was discussed at the meetings or not.

Q. You say you don't remember whether or not you had Ridgeview submit bids? A. Yes, I cannot remember.

Q. I show you Government's Exhibit No. 43 and direct your attention to paragraph 19 thereof. Does that refresh your recollection, your memory?

The Court: What page is that on?

Oh, this isn't the affidavit that you are handing him?

Mr. Jinkinson: No.

The Court: Do I have that?

Mr. Jinkinson: It is Exhibit No. 43.

Mr. Harsha: April 18th, 1942, your Honor. It is paragraph 19.

The Court: We probably have it in this mimeographed thing.

Mr. Harsha: Yes, sir.

The Court: Yes, I have it here. Go ahead. What is the exhibit number?

Mr. Jinkinson: No. 43.

Mr. Hart: If the Court please, I think this is
363 exactly what we went over before.

Mr. Jinkinson: I am trying to refresh his recollection.

The Court: He may answer.

By Mr. Jinkinson:

Q. Does that refresh your memory? A. Yes, sir.

Q. Well, did you submit bids? A. I don't know. I told you before that Mr. Cameron Peck handled those bids and Mr. Larson asked Cameron Peck. He didn't ask me. I have no authority to give Mr. Larson permission to put in bids there. That was all handled by Cameron Peck. I told you that repeatedly, that he had handled those bids since 1940. He wouldn't let anybody interfere in anything he did.

Q. You don't recall the matter being discussed at the sales committee meeting? A. If it is in the minutes there I would say it was brought up at the meeting and directed to Cameron Peck. I had no authority to give Mr. Larson permission to—that was Cameron B. Peck. He was handling the bids. I have told that repeatedly.

Q. Were you there when it was discussed, the ques-
364 tion whether or not Ridgeview would submit a bid?

A. If it is in the minutes and I was present, I would say yes.

Q. But you cannot recall anything about it? A. No, I cannot remember just at this time.

Q. Do you know whether or not Ridgeview did submit bids to these institutions for the delivery of milk? A. I don't know. If they did, Cameron Peck wouldn't tell me about it.

The Court: We will recess until Monday morning at 10:30.

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H. C. Eggleston, a witness, called on behalf of the Government, having been previouly first duly sworn, resumed the stand, was examined and testified further as follows:

The Court: Would you like to sit down here during the interrogation?

A Voice: Yes.

The Court: You may proceed.

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Direct Examination by Mr. Jinkinson (Ctd.):

Q. Mr. Eggleston, you have previously been sworn in this matter? A. Yes, sir.

Q. I hand you a document marked Government's Exhibit No. 47 for identification, and ask you if you have ever seen that.

The Court: 47?

Mr. Jinkinson: 47, your Honor.

367 The Court: Do you have a copy of it?

Mr. Jinkinson: Yes, your Honor. We have but the one copy.

Mr. Hart: Mr. Jinkinson, could you identify it by date? It is a little easier for us.

Are these some of these purported sales committee meetings?

Mr. Jinkinson: No, no.

This is a purported anonymous letter received by the Antitrust Division.

By the Witness:

A. The first time that I saw this letter was when I was called down to the FBI, and Mr. Neafsey asked me if I wrote the letter.

By Mr. Jinkinson:

Q. And did you write that letter? A. I did not.

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Q. Mr. Eggleston, I have previously shown you Government's Exhibit No. 45. I think you testified that you signed that exhibit? A. That is my signature.

Q. Do you know who prepared Government's Exhibit 45? A. The only statement I ever gave Mr. McConnell was taken down by his secretary, Miss Seapan.

Mr. Jinkinson: The Government moved to strike the answer as not being responsive to the question.

The Court: It may be stricken.

Mr. Jinkinson: Read the question, Miss Reporter.

(The last recorded question was read by the Reporter.)

The Witness: I was always under the impression it was Mr. McConnell's secretary.

Mr. Jinkinson: I move to strike that answer as
370 not being responsive, your Honor.

The Court: Motion denied.

By Mr. Jinkinson:

Q. Do you know who prepared Government's Exhibit 45? A. If she didn't prepare it, I don't know who did.

Q. All right. That answers the question. Now, when did you first see Government's Exhibit 45? A. In your office last Monday.

Q. That was the first time you have ever seen it? A. That is correct.

Q. Yet you admit you signed it? A. That is my signature on the copy that you had in your office last Monday.

Q. Mr. Eggleston, did I have that Exhibit 45 which I now hand you in my office last Monday? A. You had a correct copy of it, and it was signed "H. C. Eggleston," and I told you at that time that was not my signature, and I refused to discuss it with you.

Q. Did you see this document in my office? A. I saw a correct copy of that document.

Q. You didn't see this document in my office, did
371 you? A. No. That is not the one. But I saw a correct copy of it.

Q. That answers the question. When did you see this document, the first time you saw Government's Exhibit 45? A. The first time that I can remember seeing that is when you handed it to me Friday.

Q. Yet you admit you signed it? A. That is my signature.

Q. But you didn't see the document? A. I signed a lot of papers over there with Mr. McConnell that was blank, that he told me he had to prepare things to present in our Cola-Cola case. That was why I was so mystified when I saw that in your office.

Q. You admit this is your signature attached to Government's Exhibit 45? A. I told you that was my signature.

Q. When you affixed your signature to Government's Exhibit 45, were the attached eight pages there at that time? A. I don't remember. I cannot remember of me signing a statement of that kind.

I told you that was my signature, but in the prepa-
372 ration of the Cola-Cola case, I signed a number of papers, and they said, Just sign them. We have got to have your signature to present them in Court.

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Q. Who was present when you signed Government's Exhibit 45? A. I don't remember signing that.

Q. Was it signed at any one's office? At McConnell's office? A. I told you I can't remember signing that. I was very much surprised when you showed me a copy in your office last Monday.

Q. And you don't know who drafted the Government's Exhibit 45? A. No, I don't.

Q. Or who prepared it? A. I don't.

Q. And you admit it is your signature, but you don't remember the document, don't remember signing it, is that right? A. No, I don't.

Q. Do you know who gave the draftor of this document the information contained in it that it could be placed in this document before it was presented to you for
373 signature? A. I imagine it was Mr. McConnell.

Mr. Hart: I object.

The Court: Objection overruled. The answer may stand.

Mr. Jinkinson: I move to strike the answer as not being responsive.

The Court: Motion denied.

By Mr. Jinkinson:

Q. Mr. Eggleston, do you remember ever making a statement to Mr. McConnell, as contained in Government's Exhibit 45, as follows:

"There also were many milk depots opened up on the fringe of Chicago selling milk in gallons and half gallons at a greatly reduced price—"

Mr. Ball: I object to the question and move it be stricken as an attempt to read matters from a document not received in evidence, not a proper document, and not a proper way to get these into evidence, not a proper way of getting these facts into evidence, containing a statement of opinion and conclusion, and not identifying the
374 source of the statement from which the opinion and conclusion are made.

The Court: Objection overruled. I would like to hear the rest of it, and then you may renew the objection.

By Mr. Jinkinson:

Q. (Continued) "Bowman then decided that they would organize a subsidiary company, and use that as a 'fighting company' on any dairy which cut its price on any one taking Bowman's accounts."

Mr. Ball: Same objection.
Mr. Jinkinson: Let me read this.
Mr. Ball: Excuse me. You looked up.
Mr. Jinkinson: Let me read the entire quotation, and I will ask the witness not to answer until you have had sufficient time to make your usual short objection.

By Mr. Jinkinson:

Q. (Continued) "Bowman purchased a dairy in Evanston known as the Radcliffe Brothers, who was operating two small routes. Bowman changed the name to Ridge-
375 view Dairy. Bowman then told Borden about these plans, and gave them to understand just why the Ridgeview Dairy was being organized.

"Mr. Smaha and Mr. Baril of the Borden Company told us that they were also going to form such a company, (called the Belmont Dairy), to be used to fight any competition. There was a definite understanding reached between Bowman and Borden that these two companies, Ridgeview and Belmont, would not be used against one another.

"The two companies operated for several years before anyone knew that they were owned by Bowman and Borden."

Now, did you make that statement, or one substantially like it, or similar to it, to Mr. McConnell?
Mr. Jinkinson: Don't answer, until he has a chance to object.

Mr. Ball: The same objection, and the further ob-
376 jection that this is not the proper way to refresh the witness' recollection. The witness could have been shown the document and asked to read it and state whether it refreshes his recollection, that it contained remarks as to conversations purportedly between the witness and an agent of the defendant, Borden Company, which agent is now dead, Mr. Baril.

The Court: The objection is sustained. I think you should use it to refresh his recollection first, and then ask him these questions. Then if he testifies contrary here, then I will consider whether it is proper impeachment. He hasn't been asked those questions as yet. It is improper to get it in by reading a statement he may have made at some previous occasion.

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By Mr. Jinkinson:

Q. Mr. Eggleston, I hand you Government's Exhibit 45, and ask you to read the paragraph on Page 4, and continuing over to the paragraph on the top of Page 5.

Mr. Hart: Mr. Jinkinson, because we don't have a copy, may I ask you whether that is what you just
377 read in connection with your last question?
Mr. Jinkinson: Yes, sir, it is.

By Mr. Jinkinson:

Q. Now, Mr. Eggleston, did you ever have a meeting with Mr. Smaha?

Mr. Ball: Did the witness answer the last question?
Mr. Jinkinson: The objection was sustained.
The Witness: No, I understood he asked me if I could remember making that statement to Mr. McConnell.
Mr. Jinkinson: And the objection has been sustained.
The Court: Go ahead with your question.
The Witness: The statement I made—
The Court: No. Ask him a new question. I sustained the objection.

By Mr. Jinkinson:

Q. Did you ever have a meeting with Mr. Smaha, and Mr. Baril of the Borden Company, in which you discussed the formation of the Belmont Dairy Company?

Mr. Ball: Just a minute. May I have that ques-
378 tion read?
The Court: Read the question.

(The question was read by the Reporter.)

Mr. Ball: Objected to, as going into matters already covered on the examination of this witness.
The Court: Objection overruled. He may answer.

By the Witness:

A. I met Mr. Baril at one of the labor meetings. I can't remember who was with him, whether it was Mr. Smaha or Mr. Kuehne, and I told them that we had purchased the Ridgeview Dairy, that we were going to use the Ridgeview Dairy to meet this vendor type of competition that they were operating. There was a number of concerns like Meadowmoor and Lake Valley, and a number of others operating as strictly vendors, and also distributors coming in from the outlying territory, and coming in and sell-

ing milk at a ridiculous price, because they didn't have to pay the union scale, and they didn't pay the farmer's price, and the only way we could compete with that type of competition was to organize a company along the same lines, and that is what I told Mr. Smaha, or Mr. Baril,
379 and Mr. Smaha was present, or Mr. Kuehne, I can't remember. And they told me they have been considering forming a company along the same lines, and operated strictly as a distributor or a vendor type of distribution in order to meet that type of competition.

By Mr. Jinkinson:

Q. Now, was anything said at the meeting between you and Mr. Baril and Mr. Smaha about your not using the activities of the Ridgeview Company against Borden, and they not using the activities of the Belmont Company against Bowman? A. I told Mr. Baril that we were not going to use the Ridgeview Dairy against them in order to start a price war.

Q. And what did Mr. Smaha or Baril say to that statement? A. They said if they organized the Belmont Dairy, they were going to use it solely to meet the vendor type of distribution.

Q. Did they say whether or not they would use it against Bowman and Ridgeview? A. Well, when they told me that they were going to use it strictly against that type of distribution, I took it for granted that that is what they meant.

380 Mr. Ball: I move to strike out what the witness took for granted.

The Court: Objection overruled. It may stand.

By Mr. Jinkinson:

Q. Did you ever meet Mr. Smaha or Mr. Baril at the Lake Shore Club at Chicago? A. At what time?

Q. Did you discuss the formation of the Belmont Company or the Ridgeview Company? A. I don't recall meeting them at the North Shore to discuss that. I am pretty sure that was taken up when I met them at one of the labor meetings.

Q. You have never testified that you met them at the Lake Shore Club?

Mr. Ball: I object to the question as an attempt to not specify where and when the testimony was taken, or under what circumstances, and the attempt to refer to the deposi-

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tion taken in previous litigation subject to the previous rulings of this Court.

The Court: Objection sustained.

By Mr. Jinkinson:

Q. Mr. Eggleston, with whom did you discuss the
381 purchase of the Radcliffe Brothers Dairy Company at the Bowman Company? A. If I remember correctly, that was my recommendation.

Q. You recommended that Bowman purchase the Radcliffe Brothers Company? A. That is correct.

Q. Now, do you know whether or not you were authorized to make the purchase? A. We had a Purchasing Committee at that time, and I think that they were authorized to look into the matter and conduct whatever negotiations were necessary.

382 Q. Was that a standing committee? A. Pretty much so, yes.

Q. And who was on that committee? A. Well, it was handled pretty much by Mr. Phillipi.

Q. Were you on that committee also? A. No, I was not.

Q. You were not on the committee? A. No.

Q. You just made this recommendation to the committee. A. I made the recommendation to the board of directors.

Q. That they purchase Ratcliff? A. Yes, that I understood that it was for sale, and I recommended that we try to purchase it and operate it, the same as Ratcliff Bros. had been operating and see what is going on.

Q. Were you assigned any duty or any activity with reference to the purchase of the Ratcliff Bros. Company? A. No, sir.

Q. You had nothing to do with the purchase? A. No, sir.

Q. You merely made the recommendation? A.
383 That is correct.

Q. Now, when Ratcliff Bros. Dairy was purchased, how soon thereafter was the name changed to Ridgeview? A. That is hard for me to remember. I think about six months or so.

Q. Incidentally, do you know whether or not the Ratcliff Bros. Dairy was a corporation at the time you purchased it, or a partnership, or what form of entity was it? A. I don't know.

I think it was a partnership.

Q. And do you know whether or not Bowman organized a new corporation called Ridgeview to take over the assets of the Ratcliff Bros. Company? A. I wouldn't know.

Q. Do you know whether or not Bowman made any public announcement that it had organized a company called Ridgeview? A. I hadn't heard of them making any public announcement.

Q. Well, did you or anyone else in the company, the Bowman Company, make any effort to conceal from the public or others that Ridgeview was owned entirely
384 by Bowman?

Mr. Ball: I object to that as asking for an opinion and conclusion on something that is not a statement of fact.

Mr. Hart: I do not see the materiality of it.

Mr. Jinkinson: Well, the materiality of it is this: There is an allegation—

The Court: Objection overruled. The objection as to materiality is overruled.

The objection going to the question as to whether anyone else made any effort to conceal is sustained.

And whether he made any effort, he may answer.

By Mr. Jinkinson:

Q. Did you make any effort? A. No, sir.

Q. Mr. Eggleston, what is a milk vendor as used on the Chicago market? A. A milk vendor is a man that owns his own truck, buys his own truck license, milk license, and he buys milk and stands all the insurance and everything, and he buys his milk and pays cash for it at the
385 platform.

Q. From dairy companies in Chicago? A. That is correct.

Q. Does he buy any from producers outside of Chicago? A. I haven't heard of them.

Q. Generally, a milk vendor buys milk from the milk dairy in Chicago and resells it? A. That is correct.

Q. Does he resell it to wholesale? A. Wholesale and retail.

Q. And retail? A. That is correct.

Q. He is an independent contractor? A. Yes, sir.

Q. Does he also operate retail routes? A. I wouldn't know.

There were some retail vendors.

Q. Very many of them? A. I don't know. I have never made a survey.

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Q. Did Ridgeview sell milk to any milk vendors in Chicago? A. Retail milk vendors.

386 Q. Wholesale or retail? A. Oh, yes.

Q. Did they sell any to retail routes that you know of? A. I don't know.

I never did supervise the Ridgeview operation.

Q. Did you have charge of the milk sales of both companies, both Bowman and Ridgeview? A. I was made sales manager in 1941.

Q. From that time on did you have charge of the milk sold by both Bowman and Ridgeview Company? A. I would like to have you clarify that. What do you mean having—

Q. Supervision, direction, control of milk sales. A. I believe I told you Friday, Mr. Jinkinson, that I was made sales manager, and I was sales manager in name only; that Cameron Peck was running the sales.

Q. Mr. Eggleston, I hand you a document marked Government's Exhibit 48 and ask you if you have seen this (handing a document to the witness). Will you tell us what it is? A. I believe it is a copy of the sales committee meeting.

387 Q. And is that one of the minutes which you delivered to Mr. McConnell? A. This is one of the minutes that was taken out of my brief case in McConnell's office.

Q. Prior to that time it was in your possession? A. That is correct.

Q. Is that the document which you received in the ordinary course of business while you were employed at the Bowman Dairy Company? A. I believe it is.

Q. And it was a document, or one of the copies of the sales committee meeting which was laid on your desk in the course of your employment? A. Yes.

Q. Now I direct your attention to paragraph 9 thereof and ask you to read it (handing a document to the witness). A. (The witness refers to a document, and then returned it to Mr. Jinkinson.)

Q. Now directing your attention to the first page of Exhibit 48, were you in attendance at that meeting? A. Yes.

Q. Do you remember the discussion which took

388 place as set forth in paragraph 9 thereof? A. I don't recall any discussion outside of Mr. Peck making the remark—

Q. There was no discussion with reference to Ridgeview

continuing the fighting with Hawthorn? A. I don't remember any discussion outside of Mr. Peck making that remark to Mr. Larson.

Q. Who is the Hawthorn referred to in the paragraph 9? A. That is Hawthorn-Mellody Farms Dairy.

Q. Was that a competitor of the Bowman Company at that time? A. Yes.

Q. When did they come into the market? A. Oh, I think away back in '36 or '37, if I remember correctly.

Q. Were they at that time or prior—at one time did Bowman buy all the milk produced by the Hawthorn-Mellody Farms? A. I don't know. I had nothing to do with the production.

Q. Can you state to the best of your knowledge that they started operating on the market here in a delivery of
389 sales, a delivery of milk in about 1936 to 1937? A. I think that is when they started in the Highland Park area.

Q. Do you know anything with reference to the fight referred to in paragraph 9 of Exhibit 48? A. Yes. There was a price war going on at that time.

Q. Between Hawthorn and Ridgeview? A. I think it was between Hawthorn and Bowman and Ridgeview.

Q. Was Ridgeview meeting Hawthorn's prices? A. We were using Ridgeview to meet Hawthorn's competition.

Q. And was the Bowman Dairy Company meeting Hawthorn's prices? A. I can't remember.

Q. But you do know that Ridgeview was? A. Yes.

Q. Was that the purpose for which Ridgeview was set up, to meet the competition?

Mr. Ball: Objection to the question as calling for the opinion and conclusion of the witness and going into matters heretofore already covered.

390 The Court: Overruled.

By the Witness:

A. Hawthorn-Mellody had a number of vendors at that time, and we used Ridgeview Company to meet the vendor type of distribution.

That is why Hawthorn was able to go out and cut prices because they were doing it with their vendors.

By Mr. Jinkinson:

Q. And Ridgeview was meeting that competition? A. Yes.

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Q. Mr. Eggleston, I hand you a document marked Government's Exhibit No. 49 for identification. Can you state what that is? A. I believe that is a copy of the minutes of one of the sales committee meetings.

Q. Is that also a copy of the document, or one of the documents turned over to Mr. McConnell by you? A. That is one of the copies that was taken out of my brief case in Mr. McConnell's office.

Q. Was that a document which came across your desk or came into your possession in the ordinary course of business while you were with Bowman? A. Yes, I
391 believe it was.

Q. When you left the Bowman Dairy Company did you take that document with you? A. I believe it was in my brief case.

Q. At that time you had it in your possession at all times up until the time you delivered it to Mr. McConnell? A. I did not deliver this to Mr. McConnell. They were taken out of my brief case in Mr. McConnell's office.

Q. I direct your attention—

The Witness: Mr. McConnell agreed to that on Monday afternoon, or Friday afternoon, when I talked to him, he admitted to me that it was taken out by him.

Mr. Jinkinson: The Government moves to strike the voluntary testimony of the witness.

The Court: It may be stricken.

By Mr. Jinkinson:

Q. I direct your attention to paragraph 4 thereof and ask you to read it (handing a document to the witness).

A. (The witness refers to a document, and then re-
392 turned it to Mr. Jinkinson.)

Q. The fight referred to in paragraph 4 thereof, is that a continuation of the fight referred to in paragraph 9 of the previous exhibit, 49? A. I believe it was.

The Court: 48.

Mr. Hart: 48.

Mr. Jinkinson: 48. You are right.

393 Q. How long did that alleged price war continue?

A. I can't remember right at this time. It went on for a period, then it stopped, and then it flared up again.

Q. When did it discontinue? A. The date?

Q. About. A. I can't remember the date.

Q. I don't want the exact date. Do you remember the year? A. Off hand, I can't.

Q. Was it in 1942? A. I think it was prior to that. It might have been 1942. In fact, I am sure it was prior to that while Mr. Phillippi was still with the company, and he left in 1941.

Q. At any time when this price war was going on between Bowman, Ridgeview and Hawthorn-Mellody, did you ever talk to anyone at the Hawthorn-Mellody Dairy concerning it? A. Yes, I talked with Mr. Lipsky. He called me on it a number of occasions.

Q. You talked to Mr. Corydon? A. Yes, I did.

Q. Do you know him?

394 Mr. Ball: That is C-o-r-y-d—

Mr. Jinkinson: No, it is misspelled in here. I think the correct spelling is C-o-r-r-i-g-a-n.

Mr. Ball: No, it is C-o-r-y-d-o-n.

By Mr. Jinkinson:

Q. You knew him? A. Yes.

Q. You knew Mr. Lipsky? A. Yes.

Q. Who were they? A. Oh, I think Mr. Lipsky was supposed to be sales manager, and I think Mr. Corydon was managing their Evanston branch at that time.

Q. I believe you said that either Mr. Lipsky or Mr. Corydon called you, is that right? A. Yes.

Q. Did you ever call them? A. I believe I did call Mr. Corydon when this thing first started.

Q. On the telephone? A. Yes.

Q. What did you discuss with him? A. I told him at that time that from all the reports I was getting that it looked like we were heading for a full scale price war.

395 Q. What did he say? A. He put all the blame on our men, and our men put the blame on them.

Q. What were all the reports you were hearing which caused you to believe that you were heading for a price war? A. Because they were using their distributors to go out and cut the price.

Q. Did you meet that price? A. Where it was necessary in order to hold our price we did.

Q. Did you meet it with Bowman or Ridgeview? A. I think in most cases it was met with Ridgeview.

Q. Now, how long did the price war continue before you turned Ridgeview loose on it?

Mr. Ball: I object to the phrase used by counsel as not bearing any reference to any statement made by the witness.

The Court: Sustained.

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By Mr. Jinkinson:

Q. Mr. Eggleston, I have Government's Exhibit 45 and I direct your attention to page 6 thereof, the third line from the top, and ask you to read it. A. Yes.

396 Q. What did you do with reference to directing the activities of Ridgeview against Hawthorn-Mellody? A. Well, the Hawthorn-Mellody had men out following our trucks getting names and addresses and we put our men out following their trucks.

Q. What did you instruct these men to do? A. Solicit the business.

Q. Anything else? A. That is all I can recall right now.

Q. Did you instruct them to get the names and addresses of wholesale accounts of the Hawthorn-Mellody Company? A. If I remember correctly, they were taking the names and addresses of all of our accounts and we did the same.

Q. Did you instruct your men to make a list of the names and addresses of wholesale accounts of the Hawthorn-Mellody Company? A. They were making a list of ours and I think we made a list of theirs.

Q. Did you instruct your men to do that? A. I don't recall. I didn't handle that. Mr. Peck was supervising, I think, Ridgeview at that time.

Q. Did you meet Hawthorn's prices? A. Where

397 it was necessary to hold our business we did.

Q. Did you go below Hawthorn prices at any time? A. No, sir, at no time did we go below their prices.

Q. Mr. Eggleston, when this affidavit was made, when it was prepared, did you tell anyone that you turned Ridgeview loose on the Hawthorn-Mellody accounts or anything similar thereto? A. I told them that we used Ridgeview to meet that competition.

Q. You turned Ridgeview Dairy loose on the Hawthorn-Mellody accounts? A. I can't remember that statement of turning anyone loose. I told them we used Ridgeview to meet that competition, which we did.

Q. Did you subsequently adjust the differences between Hawthorn-Mellody and the Bowman Dairy Company or Ridgeview? A. Yes, we did.

Q. By a conference, or how? A. I think Mr. Lipsky called me and asked me to meet he and Mr. Peters

398 over at the Lake Shore Club.

Q. Did you meet them? A. I did.

Q. About what time, do you recall? A. I can't remember what time that meeting took place.

Q. Who was present at the meeting? A. Mr. Lipsky, Mr. Peters and myself.

Q. Wasn't Mr. Peck with you? A. No, sir.

Q. On this particular occasion you were authorized to act on behalf of the Bowman Dairy Company without Mr. Peck being along? A. I was not authorized. I took it upon myself to meet them.

Mr. Hart: Object.

The Court: Objection overruled.

By Mr. Jinkinson:

Q. Who was Mr. Peters, do you know? A. Mr. Peters I think was president of Hawthorn, general manager, or something.

Q. Where did the meeting you testified which took place at the Lake Shore Club take place, any particular
399 place in the Lake Shore Club? A. I think that we had lunch in the dining room and then we sat in the lobby and discussed it.

Q. How long did these discussions continue on? A. Oh, I would say that discussion didn't last maybe after lunch thirty or forty minutes.

Q. Did you ever tell anyone that drafted Government Exhibit 45 that the meeting lasted, the conference lasted for several hours? A. I can't remember making that statement.

Q. What was said between you and Mr. Lipsky and Mr. Peters of Hawthorn-Mellody with reference to the matter under discussion?

Mr. Hart: I object to that, if the Court please, in view of the witness' former answer that he was not authorized on behalf of any defendant here.

The Court: Overruled. He may answer.

The Witness: What was the question?

(Question read.)

By the Witness:

A. We both admitted that we were very foolish for getting into a price war, that neither one of us was making
400 any headway; the only one that was benefitting by it was the storekeeper.

Q. What else was said? A. Well, the discussion was along that line and Mr. Lipsky said that they didn't want to sell milk below their cost. And I told them we didn't want to sell milk below our cost.

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Q. Was anything else said? A. And I think Mr. Lipsky said they were going to instruct their men to raise the price of all of these accounts where they had to cut the price, and if I remember correctly I think I told him, "Well," I said, "we are going to take all the business we can from you but we are not going to go out and cut your price to do it. If we can get any account at our price, we are going to take it, but it is not our policy to start a price war."

Q. Subsequent to this meeting, shortly after this meeting, did Ridgeview raise its prices? A. Yes, they raised to their regular price, yes.

Q. Did Hawthorn-Mellody raise its price to its regular price? A. I don't know.

Q. You didn't look into the matter? A. We didn't get any complaints that they were selling below their regular price.

401 Q. Was there any discussion between you and Mr. Lipsky and Mr. Peters with reference to the wholesale accounts served by Ridgeview and served by Hawthorn-Mellody? A. The only discussion that I can recall that I told them that we were not going to allow these vendors or distributors to go out and cut below the regular price.

Q. Was anything said with reference to each company maintaining its status quo on wholesale accounts? A. The only thing that was mentioned in regard to status quo that we were not going to go out and cut their price, we weren't going to allow our men to cut our price, but it was definitely understood Mr. Peters told me if they could get an account at the regular price they were going to take it. And I said we would but we wouldn't allow our men to cut the price and start another price war.

Q. Was there anything said with reference to not soliciting each other's accounts? A. I told them that we were not going to allow our men to go out and solicit their ac-

402 counts and cut our price.

Mr. Jinkinson: I move to strike the answer as not responsive to the question.

The Court: Motion denied.

By Mr. Jinkinson:

Q. Mr. Eggelston, I show you Government Exhibit 45 and direct your attention to the first full paragraph on page 6 thereof, particularly to the third sentence in the paragraph.

Does that refresh your memory as to whether or not you had any conversation with Mr. Peters or Mr. Lipsky at the Lake Shore Club at the time stated by you in reference to soliciting wholesale accounts of each other's dairy? A. I told Mr. Peters—

Q. Answer the question. Does it refresh your memory? A. Yes.

Q. What was said? A. I told them that we would not allow our men to go out and solicit their account and cut under our regular price. If we get an account at our regular price, we were going to take it.

Mr. Peters told me they were going to do the same
403 thing.

Q. Was there any agreement or understanding that Ridgeview would continue to serve the wholesale stops it was then serving and that Hawthorn-Mellody would agree to serve the stops which they were then serving?

Don't answer the question until Mr. Ball has a chance to make his objection.

Mr. Ball: Object as invading the province of the court and calling for a conclusion of the witness.

The Court: Overruled. He may answer.

By the Witness:

A. I don't remember of any discussion on who was going to serve those acocunts that was taken away.

By Mr. Jinkinson:

Q. Mr. Eggleston, I hand you a document marked Government Exhibit 50 for the purpose of identification. Can you state what that is? A. That is a copy of the sales committee meeting minutes.

Q. Is it one of the sales committee meeting minutes which came to you while you were employed at the
404 Bowman Dairy Company? A. I believe it was.

Q. And it came to you in the usual course of business of the company? A. Yes.

Q. Is it one of the minutes which you took with you when you left the Bowman Dairy Company? A. I believe it is one of the minutes that was in my brief case when I left.

Q. It is one of the minutes which you delivered to Mr. McConnell's office in response to a subpoena duces tecum? A. I did not receive a subpoena from Mr. McConnell to produce any papers at all whatsoever. This is one of the

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copies that was taken out of my brief case in Mr. McConnell's office.

Q. I direct your attention to page 3, paragraph 15, thereof and ask you to read it.

Have you read it, Mr. Eggleston? A. Yes, I have.

Q. Was there any price-cutting, or do you know whether or not there was any price-cutting going on in the factory business about this time? A. Yes, there was. There
405 was a number of vendors going into the factories and selling milk at a cut price.

Q. I forgot to ask you whether or not you were in attendance at this meeting. A. Yes.

Q. You were there? A. Yes.

Q. Did you hear this discussion that took place concerning the price cutting of milk at these factories? A. That meeting was in 1941, twelve years ago, and it is impossible for me to remember all the discussions that were held at those meetings.

I know at that time that there were vendors going into the factories cutting the price.

406 By Mr. Jinkinson:

Q. And did the committee agree, or did they consider a temporary Ridgeview factory route to meet the situation? A. I can't remember that situation at all. I know that there was distributors going into our factories cutting the price.

Q. Did Mr. Larson later make a report concerning the possibility or proposal to originate a temporary route? A. I can't remember Mr. Larson making a report.

Q. In 1940, was the sale of half gallon cans of milk, or half gallons of milk prevalent on the Chicago market? A. I know they were on the fringe of Chicago. I don't know whether they had come into Chicago at that time or not. I can't remember just when they came in.

Q. And they were on sale most generally at these milk depots, is that right? A. Yes.

Q. Explain to the Court what a milk depot is, used as it is in the dairy industry in Chicago? A. Well, on the fringe of Chicago there was a great many milk depots being served by distributors. They were coming from, oh, way up in Wisconsin, and Antioch, Illinois, and their
407 milk was not approved by the Chicago Health Department, and they had un-union labor, and they were selling at a ridiculous low price, and it was impossible for us to meet that competition, being forced to pay com-

missions on all our wholesale sales, and pay the drivers the union scale.

Q. Now, at that time, in about 1940, was Ridgeview selling half gallon bottles? A. I believe they were. I think that when we purchased the Radcliffe Dairy, they were handling the gallons and the half gallons, and we went along on the same basis.

Q. Was Bowman selling half gallon bottles? A. I can't remember just when they put that on. That is about 13 years ago.

Q. Isn't it a fact, Mr. Eggleston, that Bowman later came into the market after 1940 with half gallon bottles? A. I know that there was at some time. Just what time that was that they put on the half gallon and the gallons, I don't know.

Q. Do you remember, or do you know what the differential was, between the half gallon price as sold by these depots, and the price for the same quantity of milk in a
408 quart container? A. Oh, I imagine if I remember correctly, it was around 15, 16 cents a gallon.

Q. The differential in price? A. Yes.

Q. Was the fact that these half gallon sales being offered in these milk depots for sale, and at other stores, was that hurting Bowman Brothers? A. It was only natural. We were forced to pay the union scale and purchase our milk through the Pure Milk Association. They were out buying milk on the surplus market, and paid no commissions, or anything else. It was only natural it would hurt our sales.

Q. And that was frequently discussed at your committee meetings, is that right? A. I wouldn't say it was discussed frequently. It was, occasionally.

Q. I hand you a document marked Government's Exhibit 51. Will you state what that is? A. That is a copy of the Sales Committee minutes.

Q. And was that the minutes that came across your desk in the course of your employment at the Bowman Dairy Company? A. Yes.

Q. And was that one of the minutes which you took
409 with you when you left Bowman? A. It was a copy of the minutes that was in my brief case when I left.

Q. And one of the minutes or documents which you delivered to Mr. McConnell's office.

The Court: You ought to reduce that colloquy to a record. Then we could play it.

Mr. Jinkinson: I might say, the usual question and the usual answer.

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The Court: That might shorten it.

By Mr. Jinkinson:

Q. I direct your attention to paragraph 3 of Page 1 of Exhibit 51, and ask you to read it.

You have read it? A. Yes.

Q. Now, did you or anyone under you direct Ridgeview to secure a list of these stops which were being served by competitors' half gallon bottles? A. I didn't instruct anybody to get a list.

Q. Well, did you discuss the competitive situation? A. Yes. It is only natural that I would.

410 Q. And you reviewed it with the Committee? A. Yes.

Q. And was it agreed at the Committee that this would be done? A. What would be done?

Q. That you would instruct Ridgeview to get a list of competitors, a list of competitors' stops, or a list of stops at which your competitors were serving customers, with half gallon bottles? A. As near as I can recollect from refreshing my memory from the minutes there, that a great many of our stops that these vendor companies had went in and split our accounts with half gallons and gallons, and it was discussed there about having Ridgeview go in and meet that competition.

Q. Now, the store was being served, however, by regular Bowman truck, is that right? A. That is correct.

Q. And part of the business had been split off to a competitor of Bowman's, Hawthorne-Mellody, or someone else, is that right? A. Yes.

Q. So you wanted Ridgeview to serve those stores. Why wouldn't Bowman serve them? A. Because we were

411 operating Ridgeview with a distributor type of distribution, the same as our competitor was doing.

We were in a better position to meet that type of competition with Ridgeview than we were with Bowman. We had to pay a commission on everything the Bowman driver sold.

Q. You didn't have to pay the commission on what the Ridgeview driver sold? A. At that time they were most all distributors.

Q. Did the Bowman truck cease serving the store? A. No.

Q. In other words, the Bowman truck would deliver the quarts or pints, and the cream? A. They would deliver anything that the storekeeper called for.

Q. And the Ridgeview truck would deliver the half gallon bottles, and the bottles? A. They would deliver anything the storekeeper called for.

Q. When the storekeeper ordered milk, would he order it from Ridgeview, or Bowman, or both? A. I wouldn't know.

Q. Could he get the full line of Bowman milk from
412 either Ridgeview or Bowman? A. I don't know.

Q. Well, now, don't you know, Mr. Eggleston, it is a fact that Ridgeview did not handle quarts or pints, or any products which the Bowman regular truck handled? A. Sure, they handled quarts and pints.

Q. Of all the Bowman products? A. They didn't handle Bowman products, they handled Ridgeview products.

Q. Was that the same quality of product that Bowman put out? A. I don't know. I was just selling.

Q. Were you representing it to your customers as being equal in quality? A. I mentioned before that I had nothing to do with the supervision of Ridgeview Dairy.

Q. You had nothing to do with the supervision of it, Mr. Eggleston, yet you say at this Committee meeting on February 17, 1942, in Government's Exhibit No. 51, you said that you reviewed the competitive situation, and it was agreed—I assume it was agreed with the Committee—to get a list of these stops and proceed as you have just told me you would proceed? A. May I look at that
413 again, please?

Q. Yes. (Handing document to the witness.)

Mr. Hart: What is the question?

By the Witness:

A. We agreed to get a list of the stops that we lost to our competitors, whether it was competitors that went in and split our accounts, that we would get a list of those accounts we lost and turn them over to Ridgeview.

By Mr. Jinkinson:

Q. And at that time when you discussed the matter, you were then supervising or discussing the affairs of the Ridgeview Company, were you not?

Mr. Hart: I object to the question.
The Court: Objection overruled.

By the Witness:

A. Mr. Larson, who was present at that meeting, and I think Mr. Peck, and he was supervising the Ridgeview

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Dairy, and it was only natural that I would bring it up and talk to them about it.

By Mr. Jinkinson:

Q. Mr. Eggleston, I hand you document marked Government's Exhibit 52. Will you state what that is? A. That is a copy of the minutes of the Sales Committee
414 meeting, dated July 15, 1941.

Q. Is that one of the minutes which you received, or a copy of one of the minutes which you received, or the copy of the minutes which you received in the course of your employment with the Bowman Dairy Company? A. I believe it was.

Q. And this was one of the minutes which you took with you when you left there? A. It was one of the copies, I believe, that was in my brief case.

Mr. Jinkinson: Now, I will ask him the same question and I will get the same answer about delivering it to Mr. McConnell.

The Court: You will get the same answers.

Mr. Jinkinson: There is no use in my asking it, then.

Mr. Hart: If you would like us to, we will stipulate to that.

Mr. Jinkinson: I would like to have you stipulate to that.

The Court: That if he were asked as to each of these minutes, how they got into Mr. McConnell's possession, his answer would be the same as previously given.

415 Mr. Jinkinson: Right. I would appreciate that.

Mr. Hart: That is agreeable.

The Court: All right. That will save you asking it each time.

416 Mr. Jinkinson: We do not have a copy of the exhibit—copies of Exhibit No. 52. It has a brief paragraph. Would it be all right to read it?

The Court: You may read it.

Mr. Jinkinson: So that both you and counsel will know what is in here.

Paragraph 11:

"Mr. Peck told the committee of reports that Ridgeview men are claiming their products are the same as Bowman's. Mr. Larson said he would cover this with Mr. Ekberg."

By Mr. Jinkinson:

Q. Mr. Eggleston, were you present at this meeting on July 15, 1951? A. Yes, sir.

Q. Well now, was there any—after hearing the reading of paragraph 11, does that refresh your memory as to whether or not the quality of products of Bowman and Ridgeview was the same?

Mr. Hart: If the Court please, I really do not see the materiality of this in any part of the complaint.

417 The Court: Are you making an objection?

Mr. Hart: I am, sir.

The Court: Overruled.

By the Witness:

A. I wouldn't know about the quality of Ridgeview Dairy. I had nothing to do with the production.

By Mr. Jinkinson:

Q. Did you have anything to do with the sale of Ridgeview products? A. No. I did not supervise—

Q. Who was the sales manager of the Ridgeview Company? A. I think Mr. Ekberg was.

Q. He was the sales manager? A. Yes.

Q. Your sales activity was confined to Bowman? A. To Bowman, yes.

Q. But the affairs in the proposed sale of Ridgeview were discussed at the meetings at which you attended? A. Occasionally, yes.

Q. And when they were discussed you took no part

418 in them? A. I wouldn't say that.

Q. Well, what part did you take in the discussion of Ridgeview's sales? A. I would listen to the conversation, but it was entirely up to Mr. Peck, who was supervising Ridgeview, or Mr. Larson, at that time.

Q. Would you make any suggestions to either one of them with reference to increasing sales? A. To Mr. Peck, no.

Q. To Mr. Larson, would you make suggestions? A. I think if there was any suggestions made, they were made by Mr. Peck.

Q. But Mr. Larson subsequently reported back as to his covering this matter with Mr. Ekberg, the matter referred to in paragraph 11? A. I can't remember what happened twelve or thirteen years ago; it is impossible.

Q. You don't recall, is that right? A. No, I can't remember.

Q. Mr. Eggleston, do you know whether or not in September of 1941 the Bowman Company was selling half-

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gallon bottles? A. I can't remember just the date that that was put on.

419 Q. Well, according to the best of your recollection, do you think that they were selling half-gallon bottles in September, 1941? A. I would say I thought they were in some areas.

Q. Was Ridgeview selling half-gallon bottles in 1941? A. Oh, yes.

Q. Do you know Mr. McVeigh: M-c-V-e-i-g-h? A. Yes.

Q. Who was Mr. McVeigh? A. Oh, I think at that time he was in business for himself, either shortly after they sold out Hawthorn-Mellody, I believe.

Q. In 1941 you thought he was in business by himself? A. I believe he was.

Q. Now, after he sold out the Hawthorn-Mellody did he go with them? A. Yes.

Q. That is, Hawthorn-Mellody? A. Yes.

Q. He was employed by Hawthorn-Mellody? A. Yes, that is correct.

420 Q. Who was Mr. Hedlin: H-e-d-l-i-n? A. He owns the Hedlin Dairy.

Q. The Hedlin Dairy? A. Yes.

Q. Was the Hedlin Dairy a competitor of Bowman in the Chicago area? A. Yes, sir.

Q. Who was Mr. C. J. Wieland? A. He owned the C. J. Wieland Company, I believe.

Q. And was that a competitor of Bowman in the Chicago area? A. Yes.

The Court: I think we will recess at this time until 2:00 o'clock this afternoon.

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H. C. Eggleston, resumed the stand, having been previously duly sworn, was examined and testified further as follows:

Direct Examination by Mr. Jinkinson (Contd.):

Q. Mr. Eggleston, I believe when we recessed at the lunch hour I asked you whether you knew Mr. McVeigh—

Mr. Ball: I can't hear, Mr. Jinkinson. I am sorry.

By Mr. Jinkinson:

Q. I believe when we recessed at lunch I asked you whether or not you knew Mr. McVeigh, Mr. Hedlin and Mr. Wieland and you said you knew them. A. Yes, I did.

Q. I hand you a document marked Government's Exhibit No. 53 for the purpose of identification. Can you state what that is? A. That is a copy of the sales committee meeting of September 24, 1941.

Q. And it is a copy which came across your desk
423 in the ordinary course of business while you were at Bowman's? A. That is right.

Q. It is one of the documents which you took with you when you left Bowman's employment? A. It was one that was in my brief case.

Q. Directing your attention to the first paragraph of Exhibit No. 53 will you please read that? A. I have read it.

Q. Mr. Eggleston, does the document Government's Exhibit No. 53 show you were in attendance at that meeting? A. Yes.

Q. Did you have a discussion with Mr. McVeigh, Mr. Hedlin and Mr. Wieland with reference to half-gallon bottles in the stores? A. That was about twelve years ago. It is pretty hard for me to remember what discussion I had twelve years ago with those men.

Q. Did you report to the committee that you had such a discussion? A. If it was in the sales committee minutes I suppose I did.

Q. Do you recall where the discussion took place?
424 A. I imagine it was probably one of the labor meetings at the Associated Milk Dealers.

Q. What was the discussion, if you recall? A. I cannot remember.

Q. What did you report to the committee? A. I don't remember. This was twelve years ago.

Q. Was it about this time that the Bowman Company was having difficulty in meeting the competitive situation with reference to half gallon bottles in stores? A. I believe it was.

Q. And could the discussion have been with reference to meeting the competitive price or competitive practice of other dairies in Chicago? A. If I remember correctly, McVeigh and Wieland were both operating with vendors.

Q. Is that a practice you were opposed to, Bowman was opposed to? A. No, we were not opposed to it.

Q. Did you have the discussion with Mr. McVeigh? A. I told you I can't remember what I discussed twelve years ago.

425 Q. Mr. Eggleston, I hand you a document marked Government's Exhibit No. 54 for identification. Will you state what that is? A. That is a copy of the sales company meeting of November 11, 1941.

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Q. That is a document which came into your possession in the course of business at the Bowman Dairy Company? A. I believe it was.

Q. That is a document which was in your brief case when you left Bowman? A. That is correct.

Q. I direct your attention to paragraph 11 and sub-paragraphs 1, 2, 3 and 4, on pages 2 and 3, of Exhibit No. 54 and ask you to read it.

Incidentally, before you read it, you were in attendance at that meeting? A. Yes.

You say 11?

Q. Yes, paragraph 11 and the sub-paragraphs thereunder.

You have read the paragraphs? A. Yes, sir.

426 Q. Were you at the Board of Directors' meeting held on the Tuesday morning referred to in paragraph 11 at which the competitive situation was discussed and the program was adopted by the Board? A. I cannot remember. That is twelve years ago. I can't remember what meetings I attended and what meetings I didn't attend. There were lots of times Cameron Peck would go into a huddle and bring things up without saying anything to me about it.

Q. Mr. Eggleston, the reference I make to Government's Exhibit No. 54, paragraph 11, states that this matter came up for discussion before the Board of Directors.

Do you recall whether or not you were in attendance when this discussion came up? A. I don't recall of being present at any meetings of the Board of Directors when that was discussed. Cameron Peck had a habit of taking up things himself and not saying anything to me about it and calling it a directors' meeting because he was present.

Q. And then he would put them in these minutes? A. It wasn't unusual for him to do it.

Q. When you saw those matters in the minutes of these meetings which were handed to you a day or so after the

427 meeting did you take up with Mr. Peck what you thought was incorrect statements of what was transpiring in the Bowman Company? A. Me take up anything with Mr. Peck?

Q. Yes. A. No, sir.

428 By Mr. Jinkinson:

Q. Did you ever ask him to change any of these Sales Committee meeting minutes and make them conform with what you thought took place? A. Cameron Peck

always operated as if he was the superior, and nobody had any right to question anything that he did.

Mr. Jinkinson: I move to strike the answer as not being responsive to the question.

The Court: Denied.

By Mr. Jinkinson:

Q. Did you ever ask Mr. Peck to change any of the minutes of meetings of the Bowman Company after you received them, because you thought they stated an incorrect fact? A. No, I did not, for the simple reason I didn't pay much attention to them.

Q. You took these minutes with you when you left the Bowman Company? A. They were in my brief case when I left.

Q. Were these the only papers in your brief case when you left the Bowman Company? A. That is all I can think of at this time.

429 Mr. Jinkinson: Please mark this as Government's Exhibit 56 for identification.

(The document referred to above was marked Government's Exhibit No. 56 for identification.)

By Mr. Jinkinson:

Q. Mr. Eggleston, I show you a document which has been marked Government's Exhibit No. 56 for the purpose of identification. Can you state what that is? A. That is a contract I have with the Bowman Dairy Company, not to compete in the milk business.

Q. Is that the first contract you had with them? A. No, there was a subsequent contract to this. It was practically the same.

Q. Mr. Eggleston, is this the first contract you had? A. No, that is the second.

Q. How many contracts did you have with the Bowman Dairy Company? A. This is a renewal of the first contract.

Q. How many contracts did you have? A. I had the first contract, and that is the renewal of the first.

Q. You have two contracts, is that right? A. Yes,
430 if you want to classify it as two.

Q. I show you Government's Exhibit No. 40. Is this the first or second copy? A. That is the second.

Q. I show you now Government's Exhibit 56. Is that the first or second contract? A. I believe this is the first.

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Q. Now, when you were negotiating for the contract, Government's Exhibit 56, with the Bowman Dairy Company, was it or was it not one of the terms of the negotiations that you return to the Bowman Dairy Company some documents and records which you had taken with you when you left the Bowman Dairy Company.

Mr. Ball: I object to this as entirely out of the scope of the issues in this case, has nothing to do with the impeachment of the witness.

Mr. Jinkinson: Your Honor, the witness says the documents are—

The Court: I can't hear you.

Mr. Jinkinson: The witness is testifying that the Sales Committee minutes which I have been interrogating him with reference to, are a scrap of paper, and of no
431 value. I was merely trying to prove, your Honor, that he took many papers with him, and among them were these. If they were of no value, he shouldn't have taken them along with him.

The Court: That is a matter of argument. He has testified that he has taken them.

Mr. Jinkinson: The objection is sustained?

The Court: Yes. Are you going to introduce these contracts?

Mr. Jinkinson: Yes.

The Court: 40 and 54?

Mr. Jinkinson: Yes.

The Court: Then for further reason also, they will speak for themselves when and if they are introduced, and if they are received.

Mr. Jinkinson: I thought there were some preliminary negotiations that preceded these.

The Court: Surely, if you want to go into those, you may.

432 By Mr. Jinkinson:

Q. Did you have any preliminary discussion with anyone at the Bowman Dairy Company with reference to the drafting of Government's Exhibit No. 56?

Mr. Ball: May it be understood that we have the same objection to this line of questioning?

The Court: So far as the negotiations leading up to the contract are concerned, your objection is overruled.

By the Witness:

A. I had no discussion with anyone of the Bowman Dairy Company. I had discussion with Mr. Hart.

The Court: Mr. Who? Hart?

The Witness: Mr. Hart, Sr. He was the attorney for the company.

By Mr. Jinkinson:

Q. Did any of those discussions relate to the return of any records, to your return of any records? A. I had the names and addresses of some of the wholesale accounts.

Q. And also these minutes of Sales Committee meetings?

A. The wholesale—the list of the wholesale accounts
433 was in a card—in a small box, and Mr. Hart asked me to return that list, which I did.

Q. Was anything said with reference to the Sales Committee meeting minutes? A. No, sir, they were never mentioned.

Q. Mr. Eggleston, at the time Government's Exhibit 54, at the time of the meeting set forth in Government's Exhibit 54, on November 11, 1941, did the Bowman Dairy Company own Westbrook Farms? A. I believe we had purchased Westbrook Farms Dairy previous to that, I believe.

Q. And was it operating as Westbrook Farms? A. No, sir, it was not.

Q. Was Westbrook Farms selling milk to Goldblatts under a contract?

The Court: To whom?

Mr. Jinkinson: Goldblatt's.

By the Witness:

A. We were selling to Goldblatt's. I don't know whether we had a contract with them or not. If I remember correctly, at the time we purchased the Westbrook Farms, we agreed to supply them with the same merchandise that was being supplied by Westbrook. One of the officials of the Goldblatt's owned the Westbrook Farms Dairy.

434 Q. Prior to the time you purchased it? A. That is correct.

Q. And his name, do you recall it? A. I think it was Mr. Buckley.

Q. Now, did you hear a discussion at the meeting on November 11, 1941, a Board of Directors meeting, con-

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cerning a survey to be made of the half gallon bottle situation in Chicago? A. Did you say the Board of Directors meeting, or the Sales Committee meeting?

Q. I say, the Board of Directors meeting. A. I don't recall that ever being discussed at the Board of Directors meeting.

Q. Did you ever hear it discussed at the Sales Committee meeting? A. There were so many thing discussed, I can't remember what was discussed there twelve years ago. It is just humanly impossible.

Q. You don't recall it, is that your answer? A. No, I don't remember.

Q. Now, I direct your attention to paragraph 3, sub-paragraph 3 of Paragraph 11, of Government's Exhibit 54.

435 Mr. Hart: Paragraph 3, Mr. Jinkinson?

Mr. Jinkinson: Sub-paragraph 3 of Paragraph 11.

By Mr. Jinkinson:

Q. Was the price of 50 cents per gallon stated in the exhibit a price below the price Bowman was charging, or Ridgeview was charging in general for milk?

Mr. Hart: I object to that, if the Court please. It is apparent from the sub-paragraph that this has to do solely with retail sales, consequently, is outside of the issues of this case.

The Court: Yes. What is the materiality of it in this case?

Mr. Jinkinson: I will withdraw the question.

The Court: Very well.

By Mr. Jinkinson:

Q. Did your retail men then sell gallon and half gallon bottles?

Mr. Hart: Same objection, if the Court please.

The Court: Unless it is material here, I would have
436 the same ruling. What is it you want to bring out?

Mr. Jinkinson: I want to interrogate the witness to see whether or not the retail men ever sold gallon and half gallon bottles. It is possible that this may be an error.

The Court: At retail?

Mr. Jinkinson: Yes. It is possible this may be an error, your Honor.

The Court: All right.

Mr. Jinkinson: I want to find out from him whether or not they did.

The Court: He may answer.

By the Witness:

A. Well, they are selling gallons and half gallons now off the retail routes.

By Mr. Jinkinson:

Q. Did they in 1940 to 1943? A. I can't remember when it was started.

Q. Did they on November 11, 1941? A. I don't remember when they started on the retail routes.

437 Q. Now Mr. Eggleston, what is a store differential?

A. Well, it is the difference between the retail selling price and the price being sold out of the store.

Q. The retail selling price of milk being delivered to the home? A. That is correct.

Q. And the price at which you will sell it out of the store? A. Which the storekeeper sells it.

Q. Right.

So that was there an attempt while you were there—was there an attempt while you were at Bowman to maintain a differential between retail and out-of-store price?

Mr. Tierney: That is objected to as not calling for a fact—

The Court: Overruled, if he knows.

By the Witness:

A. There has been a differential for a good many years between the retail home delivered price and the price being charged out of the store.

By Mr. Jinkinson:

Q. Did you attempt to maintain that price at a
438 certain market differential between retail and out-of-store price?

Mr. Ball: Objected to as invading the province of the court in using the word "maintained" as he is using it, and that calls for an opinion and conclusion of the witness.

The Court: Well, I think that your objection is well taken, but he may answer.

You may answer.

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The Witness: What was the question?
Mr. Jinkinson: Read the question to him.
The Court: Did you maintain the differential?

By the Witness:

A. We had nothing to do with maintaining that differential. That was up to the individual stores; some stores sold at different prices.

Some stores were willing to sell at a one-cent differential; and others wanted two.

There was some stores that sold as high as a three-cent differential.

By Mr. Jinkinson:

439 Q. Did you ever recommend to any wholesale store or wholesale stop that they maintain a certain differential? A. I don't remember.

Q. Mr. Eggleston, I hand you a document marked Government's Exhibit No. 55. Will you state what that is? A. That is a copy of the sales committee meeting—

The Court: Do you have copies?

By the Witness:

A. —dated November 18, 1941.

(Mr. Jinkinson handed copies to the other counsel.)

By Mr. Jinkinson:

Q. It was a document which came into your possession in the course of business of the Bowman Dairy Company while you were there? A. Yes.

Q. It was one of the documents which you took with you when you left? A. It was a copy of the minutes that was in my brief case when I left.

Q. I will direct your attention to paragraph 3 of
440 Exhibit No. 55 (handing a document to the witness).

A. (The witness referred to a document and returned it to Mr. Jinkinson.)

Q. Did you attend this meeting? A. My name is on the minutes; I presume that I did.

Q. Did you ever—

Mr. Jinkinson: I withdraw that.

By Mr. Jinkinson:

Q. Who was in charge of the production department at Bowman Dairy Company at this time, on November 18, 1941? A. I believe Mr. Kullman.

Q. Did you have a conversation with him relative to the half-gallon bottle on the market in Chicago? A. At the time we were putting half-gallons on our routes, I believe Mr. Kullman told me they would be ready to go into production on them on such and such a date.

Q. Did you ever have a conversation with anyone in reference to the elimination of half-gallon bottles from the Chicago market? A. Not to my knowledge.

441 Q. Was your placing of the half-gallon bottles in stores, both in the city and suburbs, on the Monday following November 18, 1941, dependent upon whether the half-gallon bottle was going to be eliminated in the Chicago market? A. It depended to this extent: They were competitive. I don't know whether we were going to meet it.

Q. Was there any effort made by Bowman or you to eliminate the half-gallon bottles? A. Not to my knowledge.

Q. I direct your attention to paragraph 8 of Government's Exhibit No. 55 (handing a document to the witness). A. (The witness referred to a document and returned it to Mr. Jinkinson.)

Q. Do you recall the letter which Mr. Peck read? A. No, I don't.

Q. Do you recall any discussion at this meeting— A. No.

Q. —with reference to Bowman's price policy? A. No.

Q. Was there any discussion relative to an attempt to bring all prices to a common level? A. Not to my

442 knowledge.

The Court: So that I may follow this more intelligently: The Mr. Peck referred to here is what relation to the Dr. Peck referred to?

Mr. Hart: He is a son, if the Court please.

The Court: His son?

And the doctor's position in 1941 was what?

Mr. Hart: President of the company.

The Court: And Mr. Peck, is this Cameron Peck?

Mr. Hart: That is right.

The Court: That he has been talking about, right?

Mr. Ball: The Government agrees to those statements of fact?

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Mr. Jinkinson: What?
Mr. Ball: The Government agrees to those statements?
Mr. Jinkinson: Oh, yes.
The Court: You can get the same information from the witness, but I just wanted to follow these com-
443 mittee reports.

By Mr. Jinkinson:

Q. Mr. Eggleston, did you know Mr. Goldman of the Western United Dairy? A. Yes, I did.
Q. You knew him in between the period of 1940 and 1941 under discussion here? A. I believe I knew him at that time.
Q. Did you ever have any conversation with Mr. Goldman in reference to Bowman losing a stop to Western United in or about 1941? A. I can't remember of ever having any discussion with him.
Q. Did you know a Mr. Louis Glick of Western United? A. Yes, I did.
Q. Did you ever have a discussion with him with reference to Bowman losing a stop to Western United? A. I can't remember having any discussion—any such discussion with Mr. Glick.
Q. That is, concerning Bowman losing a stop to Western United? A. I can't remember having any such dis-
444 cussion with him.
Q. Did you ever have any conversation or discussion with Mr. Glick or Mr. Goldman concerning Bowman and Western United maintaining the status quo with reference to their stops? A. No, sir.
Q. You at no time had such a discussion? A. No, sir.

Mr. Ball: I object to this line of questions unless the time and place are more specifically stated.
The Court: Well, the question has been answered.

By Mr. Jinkinson:

Q. Mr. Eggleston, I hand you a document marked Government's Exhibit 57 (handing a document to the witness). Can you state what that is?

The Court: Have you got a copy for me?
Mr. Jinkinson: Is there a copy of it for the court?

(Mr. Jinkinson distributed copies to counsel and the court.)

By the Witness:

A. I believe that is one of the letters that D. Cameron
445 Peck sent out to the division.

By Mr. Jinkinson:

Q. Is that on the— A. Bowman's stationery, dated August 3, 1942.

Q. The exhibit is signed by the Sales Committee? A. It is not signed by the Sales Committee. It is typed in there:

"H. C. Eggleston, Manager of Milk Sales
"D. Cameron Peck, Sales Coordinator
"E. J. Larson
"R. W. Buthman."

Q. Of course, your name appears first. Right? A. That is correct.

Q. Now, when was the first time that you saw Government's Exhibit No. 57? A. The first time I saw that when I was called in by the FBI and handed that document and they asked me what it was.

Q. And you did not receive a copy of this letter or find one on your desk? A. I don't recall if that was the letter I was shown to determine—it has been shown to me repeatedly by the FBI men in the Antitrust Division.

Q. The letter mentions a sales committee. Is that
446 your sales committee of which you were a member? A. I don't know what Cameron Peck meant. It was nothing new for him to send out letters and sign it "Sales Committee," that the rest of us didn't know anything about. I doubt very much whether the rest of the committee ever saw a copy of that.

Q. Was D. Cameron Peck a member of the board of directors of the Bowman Dairy Company? A. Yes.

Q. And did he have any authority whatsoever at the Bowman Company?

(Laughter.)

By the Witness:

A. Did he have any authority?

By Mr. Jinkinson:

Q. Yes. A. He was running the whole show.—

(Laughter.)

The Witness: As far as sales are concerned.
Nobody else had anything to say to Cameron Peck.

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By Mr. Jinkinson:

477 Q. What part of the show wasn't he running? A. What is that?

Q. What part of the show wasn't he running? A. The production department.

Q. That is the only one? A. That is about all I can think of right now.

He was messing into everything else around there.

(Laughter.)

By Mr. Jinkinson:

Q. Was he also messing around with any stops, box stops? A. I don't think so. He didn't talk to me, or I had very little discussion with him.

Q. Of course you did not, or you had not discussed these matters with him at these sales meetings? A. Not Cameron Peck.

Q. Who would you discuss it with? A. What is that?

Q. Who would you discuss them with?

Mr. Tierney: That is indefinite.

The Court: Sustained.

By Mr. Jinkinson:

Q. Who would you discuss the affairs of the Bow-
448 man Dairy Company with at the sales committee meeting, of which you were a member, between 1940 and 1943?

Mr. Ball: Same objection.

The Court: Overruled.

He may answer.

By the Witness:

A. Anything that was discussed is mentioned in the sales committee minutes.

By Mr. Jinkinson:

Q. But you would not discuss any of those matters with Mr. Peck, is that right? A. Personally, no.

Q. During or at the meeting would you discuss any of the matters whatever with Mr. Peck? A. I don't recall.

Q. Did you discuss with him? A. I don't recall any discussion, because he would never pay any attention to anything that I would bring up.

Q. Now, do you know what a regularly recurring government bid is? A. I don't know what Cameron Peck was referring to in that letter.

449 Q. I did not ask you that. I am just asking you: Do you know what a regular recurring government bid is? Do you know independently of Mr. Peck? A. Well, I imagine it is—we got bids from a great many institutions to bid on the accounts, and I suppose that is what he was referring to.

Q. And those institutions which called for bids called for them on certain periodical times, is that right? A. Cameron Peck—

Q. Every month? A. —handled that. I imagine so.

Q. Every month, or three months? A. I imagine that is the way that they were handled.

Q. Now, between the years 1940 and 1943 you did not have anything to do whatsoever with the formulation, submitting and drafting of bids to governmental or county institutions or municipal institutions, did you? A. I cannot remember of any such bids being handled by me during that period.

450 Q. Did you ever hear these institutional bids, as we have named them or designated them, discussed at sales committee meetings of which you were a member? A. Oh, there might have been something brought up that we got a bid at such and such a place and we got a bid at this place.

Q. Was there anything brought up in these meetings of planning to get bids or discussing the prices at which you were to bid? A. Not at the sales committee meeting that I could recollect.

Q. Do you know a Mr. Roggenbock?

The Court: Will you spell that?

Mr. Jinkinson: R-o-g-g-e-n-b-o-c-k.

That is the way it is spelled here, but my suspicion is it is—b-o-c-h.

By the Witness:

A. We had a Roggenbock working for us at one time.

By Mr. Jinkinson:

Q. Did you know a Mr. Roggenbock or Roggenboch that worked for The Borden Company? A. I believe I knew him when he was with the Wieland Dairy Company.

451 I had no contact with him after Borden bought off Wieland.

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Q. Did you ever contact him when he was working for Wieland? A. The Borden Company took that over, I think, in 1928, if I am not mistaken.

Q. Mr. Eggleston, I hand you a document marked Government's Exhibit No. 58 for identification (handing a document to the witness). Can you state what that is? A. (The witness referred to a document and then returned it to Mr. Jinkinson.)

That is a copy of the sales committee meeting.

Q. One that came to you in the usual course of business at the Bowman Dairy Company? A. Yes.

Q. And one that was with you when you left the Bowman Dairy Company? A. Yes.

Q. Directing your attention to paragraph 4 thereof (handing a document to the witness). A. (The witness refers to a document and returned the same to Mr. Jinkinson.)

452 What is the date of that paper?

Q. Dated September 1, 1942.

Were you present when Mr. Buthman reported a meeting when Mr. Roggenbock was present? A. I don't remember. There was—I can't remember what happened at those meetings ten or twelve years ago; it is just humanly impossible to.

Q. In other words, your answer is that you don't recall— A. No.

Q. —Mr. Buthman's report? A. No, I do not.

Q. Now, did you say—did I understand you to say that you had a Mr. Roggenbock working for you? A. Yes, we did.

Q. And what position did he hold? A. He was a driver-salesman.

Q. Was he in any way connected with submitting bids to Great Lakes or Glenview? A. Not to my knowledge.

Q. Would he ordinarily as a—what did you say, driver-salesman? A. Driver-salesman, yes.

453 Q. As a driver-salesman would he ordinarily be called in to a conference with reference to the submitting and formulating of any bids to be submitted to Great Lakes and Glenview? A. I don't know who Mr. Buthman was referring to and whether Roggenbock was in our employ, or who it was, I can't remember any such details along that line.

Q. Was Mr. Roggenbock working for you on September 1, 1942, to your knowledge? A. I don't know.

Q. With respect to the Roggenbock whom you did know,

in what division did he work? A. I think he worked for the Lakeview division at one time, and then at another time he worked for Ridgeview.

Q. And in 1942, do you know where he was working? A. No, I do not.

Q. Mr. Eggleston when did the Westbrook Dairy Farms or Farm come into the Chicago market? A. As near as I can recollect, I think it was along in '39, probably.

454 Q. Or '40? A. It could have been.

Q. During 1940 or 1941 was it considered a price cutter in the Chicago market? A. Yes.

Q. Had it submitted bids to the County Hospital on several occasions, do you know? A. I believe at the time we purchased Westbrook Farms Dairy they were serving the County Hospital.

Q. Now, do you know for how long Westbrook Farms had been serving the County Hospital? A. I don't know.

Q. What part did you have if any in the purchase of Westbrook Farms? A. I don't think that I had any part outside of when we took over the routes, to see that they were serviced.

455 Q. That is the wholesale routes? A. Yes.

Q. Wholesale stops? A. I think they were wholesale exclusively.

Q. Westbrook was wholesale exclusively, right? A. As near as I can recollect, they were.

Q. At the time you purchased them they were selling a considerable number of wholesale stops in the Loop area, is that right?

Mr. Ball: May I have that question read?

The Court: You may.

(Question read.)

By the Witness:

A. I wouldn't say they were serving a considerable amount of stops. They had a few stops, yes.

By Mr. Jinkinson:

Q. Did they have the Goldblatt Department Store? A. They have the Goldblatt Department Store, yes.

Q. Did they have the Sherman Hotel? A. That is right.

Q. Did they have Wieboldt's? A. I believe they did.

Q. Did they have any other large accounts similar

456 to that?

Mr. Tierney: What year is this, please?

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Mr. Jinkinson: In 1940, when you purchased Westbrook Farms.

Mr. Hart: If the Court please, the pre-trial order shows that the company was purchased in 1941. I think Mr. Jinkinson is in error. I believe that is the correct date.

Mr. Jinkinson: In 1941.

The Court: Let the record be in accord with that change.

By the Witness:

A. I believe those were the accounts they were serving at the time we purchased them.

By Mr. Jinkinson:

Q. Did they have any others? A. They started on some Westbrook stores they were serving. They had very few accounts.

Q. Was the Westbrook Farms primarily in competition with the Central Wholesale Division of the Bowman Company? A. Well, they were in competition with all of our divisions. The Wieboldt Stores at one time were
457 being served from our outlying divisions.

Q. Was the headquarters of Wieboldt's in downtown Chicago? A. No, they had some outlying stores like Oak Park and Evanston, Lincoln and Belmont.

Q. Was the headquarters of the Wieboldt Company downtown?

Mr. Hart: You mean the offices?

Mr. Jinkinson: The offices.

By the Witness:

A. No, sir.

Mr. Ball: Off the record, I think that we can advise Mr. Jinkinson something of the Wieboldt Stores that might save him some questions.

The Court: What is it?

Mr. Ball: I want to point out that the Wieboldt offices are on Ashland Avenue and they have no downtown retail stores.

The Court: That is correct.

By Mr. Jinkinson:

Q. Did you know of any other large accounts, large businesses in the Loop area that were being served by Westbrook Farms Dairy when you took them over
458 in 1941? A. All I could recollect is the Sherman

Hotel and the Goldblatt stores and the Wieboldt stores.

Q. Prior to the time that Westbrook entered the Chicago market how much had your Central Wholesale Division of the Bowman Dairy Company been making in profit, do you know? A. I don't know.

Mr. Hart: If the Court please, I object.

The Court: In view of the answer the objection is overruled.

By Mr. Jinkinson:

Q. When the Westbrook Dairy Farms entered into the market in the Loop area did they sell milk to these wholesale stops at a price below the price being sold by Bowman generally in the Loop area at that time?

Mr. Hart: I object to that on the basis that the witness testified they entered the market in 1938 or 1939, before the date which your Honor said is the cut-off date.

The Court: Limit the question to the time we are concerned with.

459 Do you have a further objection?

Mr. Ball: Yes, the further objection is that the question assumes the entry of business was in the Loop area, apparently based on the misconception that the Goldblatt stores are limited to the downtown store, whereas the Goldblatt stores are all over the city of Chicago.

The Court: He limited his question to the Loop area. They had at that time a store in the Loop area and still have. I assume that is what you are asking, just the Loop area?

Mr. Jinkinson: That is right.

The Court: If you limit it to the time of the scope of this suit I will permit him to answer.

Mr. Jinkinson: In 1940.

The Witness: Will you repeat the question?

Mr. Jinkinson: I will withdraw the question and frame it this way:

By Mr. Jinkinson:

Q. Mr. Eggleston, was the Westbrook Farms in the
460 year 1940 up to and including the time you took them over in 1941 selling milk to wholesale accounts in the Loop area in Chicago at a price lower than the price Bowman was selling wholesale customers in the Loop area? A. They were selling milk far below cost and that is why

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they were on the verge of bankruptcy and Mr. Buckley came over and asked us to take it off his hands.

Q. Did he talk to you when he came over and asked you to take it off his hands? A. No. I sat in at one of the meetings, I believe, with Mr. Phillipi and I think Francis Kullman sat in.

Q. What took place at this meeting when you did attend with Mr. Phillipi and Mr. Kullman with reference to the Westbrook Farms? A. I believe that Mr. Buck-
461 ley told us that he was in the hole on the operation of a couple hundred thousand dollars and he wanted to get out from under and wanted to know if we would be interested in buying the stock, and taking over the business. He told us at that time that he was into it himself financially about two hundred thousand dollars that he had put in it and they couldn't operate any further. They didn't have any more money to pay their bills or pay for the truck rental, or anything else.

Q. Were you serving on a committee of any kind, a purchasing committee at Bowman, at this time, on this particular occasion that you discussed; the committee you were on, was that a purchasing committee? A. No, I think I was just asked to sit in on it. I think Mr. Phillipi was on the purchasing committee at that time.

Q. Can we state about what time this meeting was with Mr. Buckley? A. Oh, I think that when we were approached, it was back in 1938 or 1939.

Q. But not in 1941? A. I don't recall. We were approached several times. We were approached by Buckley and then we were approached by his brother, Mr.
462 Gold.

Q. Westbrook Farms entered the Chicago area at about what time, do you know? A. As near as I can recollect, it was around 1938 or 1939.

Q. 1938 or 1939. It was not in 1940? A. I don't—I was always under the impression it was prior to that.

Q. Do you know? A. I'm not sure, no. I can't remember.

Q. Can you state definitely, or do you know, when the first meeting was held between you, Mr. Phillipi, and who was the third member of Bowman's? A. I think Mr. Kullman sat in.

Q. Mr. Kullman and Mr. Buckley? A. I can't remember the date of that meeting.

Q. Do you know whether it was prior to 1940, or after 1940? A. I would say it was shortly before we purchased the business.

Q. Before you purchased the property? A. Yes.

Q. As far as you know, there was no other negotiation except the negotiation which was started in 1941 for
463 this property, is that right? A. We had been approached prior to that.

Q. How long prior to that? A. I don't remember. I knew Mr. Gold who is Mr. Buckley's brother approached us.

Q. Was it prior to 1940? A. I cannot remember the date.

Q. Is this the first contact you had with the purchase of Westbrook Farms, the one you are telling us about where you and Mr. Kullman and Mr. Phillipi talked to Mr. Buckley, the first contact you had with it at any time? A. As far as I can recollect, it was.

Q. Did Mr. Buckley tell you at that time that he had $200,000 invested in Westbrook Farms and that he wanted to sell the property to Bowman? A. As near as I can recollect Mr. Buckley said that they were operating in the red and they had lost better than $200,000 and he didn't want to put any more money into it and he would have to do it to keep it going. He didn't have money to pay for the truck rental. He owed the farmers and he wanted us to buy the business so he could get out of it.

464 By Mr. Jinkinson:

Q. Where did this meeting take place? A. I believe at 140 West Ontario Street.

Q. Is that the headquarters of the Bowman Dairy Company? A. That is correct.

Q. What steps were taken by Mr. Phillipi, you, and Mr. Kullman looking towards the purchase of the dairy company at this meeting, that is, the Westbrook? A. I believe at that meeting that it was understood that we would enter into negotiations, and it was turned into our Cost Department to check on the assets and the liability, and from that time on I had nothing more to do with it.

Q. While you were a member of the Board of Directors, isn't it true that the Cost Department, as you say, made a report to the Board of Directors of the Bowman Dairy Company concerning the investigation they were instructed to make? A. I believe they did.

Q. And you were in attendance when this report was read, and did it not say that the physical assets of the Westbrook Dairy Company amounted to about $60,000? A. I don't remember what the report was.

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465 Q. How much did you eventually pay for the Westbrook Dairy Company? A. That is something I wouldn't know.

Q. You didn't know that you paid about $240,000 for the property? A. No, sir.

Q. Were you at the Board of Directors meeting when it was voted to purchase the property? A. I don't remember whether I was present or not.

Q. Did anyone ever tell you around the Bowman Dairy Company how much Bowman paid for the Westbrook Farm? A. No, sir, that is something that was never discussed.

Q. And you as a Board of Directors—you as a member of the Board of Directors were never told— A. No.

Q. —what your own company paid for the Westbrook Farms? A. No, sir.

Q. I suppose Mr. Cameron Peck knew? A. I wouldn't be a bit surprised.

Q. Did you ever have a meeting with a Mr. Gold or Mr. Stone of Westbrook Farms? A. I mentioned that Mr. Gold called on me.

466 Q. Did you ever have a meeting with Mr. Gold and Mr. Stone of Westbrook Farms concerning the sale of Westbrook Farms to the Bowman Dairy Company? A. I don't remember ever having any discussion with Mr. Stone.

Q. Did you ever attend any meetings with Mr. Peck outside of the Sales Committee meetings that you attended with him? A. Well, occasionally he would appear over at the labor negotiations. Occasionally he would appear at the Associated Milk Dealers meetings.

Q. You didn't go there together? A. No, sir.

Q. Did you ever transact any business with the Bowman Dairy Company in company with Mr. D. Cameron Peck? A. Not to my knowledge.

Q. Did you ever have a meeting with Dr. Peck, yourself, and Mr. Gold, and Mr. Stone of Westbrook Farms? A. No, sir.

Q. Mr. Eggleston, I show you Government's Exhibit No. 59, and ask you if you can state what that is? A. That is a copy of the Sales Committee meeting of April 29, 1941.

467 Q. That was one of the minutes which went with you when you left the Bowman Company? A. Yes, sir.

Q. And it is a copy of the Sales Committee meeting minutes which you received in the ordinary course of business? A. Yes, sir.

Q. The usual course of business of the Bowman Dairy Company? A. Yes, sir.

Q. I direct your attention to paragraph 2 thereof, and ask you to read it. A. Yes.

Q. Did you have a meeting with Mr. Stone or Mr. Gold of the Westbrook Dairy Farms in company with Mr. Peck of the Bowman Dairy Company? A. I don't recall having a meeting. I know I had a meeting with Mr. Gold, but I don't recall Mr. Stone being present. That date of that meeting is 1941. That is 12 years ago.

Q. Did you make a report to the Sales Committee of the Bowman Dairy Company with reference to the meeting you had with Mr. Gold and Mr. Stone, as you stated in this minute? A. I can't remember whether I did, or not.

468 Q. Was Mr. Peck with you when you had a meeting on Tuesday morning with Mr. Gold and Mr. Stone of Westbrook Farms? A. I cannot recall attending any meeting at all with Mr. Gold or Mr. Stone, with Mr. Peck. Mr. Peck had a great habit of putting stuff in those Sales Committee meetings in order to build himself up.

Q. Now, Mr. Eggleston, did you ever have a meeting with D. Cameron Peck, yourself, or did you ever attend a meeting with Mr. D. Cameron Peck, yourself, Mr. Baril, and Mr. Koenig of the Borden Dairy Company?—

Mr. Ball: That is Baril and Koenig, K-o-e-n-i-g. It has been spelled another way in the record.

By Mr. Jinkinson:

Q. (Continuing) —of the Borden Dairy Company, with reference to low prices charged by the Borden Company in the Evanston area? A. I don't remember of ever attending any such meeting with Cameron Peck. Cameron Peck, if he wanted to arrange a meeting, he always did that by himself. I was just simply ignored.

Q. Mr. Eggleston, I call your attention to paragraph 12 of the Exhibit 59 which you have just read from,

469 and ask you to read that paragraph. A. Yes.

Q. Was it decided at the meeting at which you attended, that you and Mr. Peck would have a meeting with Mr. Baril and Mr. Koenig? A. It is stated in that, in the minutes there, that Cameron Peck was going to call the Borden people to have lunch.

Q. Did you have lunch with them? A. No, sir.

Q. It is also stated here that you were to attend it, is that right? A. It is stated in the minutes, yes.

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Q. You were at the meeting when this decision to have the luncheon engagement was made, were you not? A. Yes, but Cameron Peck was, he had a great habit of putting things in the minutes there in order to build up himself, that never transpired, at the Committee meetings, and the other members of the Committee can bear me out on it.

Q. It was another D. Cameron Peck curve thrown at Mr. Eggleston? A. That is correct.

Q. Referring back, now, to the purchase of the
470 Westbrook Farms by Bowman, did the cost accounting department ever report to you, to the Board of Directors, as to how much Westbrook Farms was worth? A. I can't recall.

Q. Now, when you purchased Westbrook Farms, did you also get the business of the County Hospital? A. If they were serving the County Hospital at that time, I imagine we did.

Q. Did you have a conversation thereafter with someone or anyone from the Capitol Dairy Company with reference to serving or selling milk to the County Hospital? A. I can't recall having any such conversation with him, because I didn't handle the bids. That was handled by Mr. Kettell.

Q. Handled by whom? Mr. Kettell? A. Mr. Kettell, yes.

Q. Not handled by Mr. Peck, it was handled by Mr. Kettell? A. Mr. Kettell handled that himself.

Q. County Hospital? A. Yes.

Q. What did Mr. Cameron Peck handle? A. Oh, he was supervising the Evanston, Highland Park, he handled
471 those, and a lot of other stuff that I don't know anything about.

Q. Did he handle any of the institutional bidding, Mr. Peck? A. Well, according to that letter, I imagine he was going to take over everything when he sent out that letter in 1942.

Q. Can you tell me how much below Bowman's price was Westbrook selling milk in the loop area when they lost this money? A. I can't remember the prices at that time. That was 12 years ago.

Q. Do you know whether it was a large or small differential? A. I don't remember what it was. I know that they were operating at a terrific loss, and Mr. Buckley told us that they simply couldn't continue any further.

Q. After Bowman received a bid at one of these institutions, did you have anything to do with seeing that the

contract was fulfilled, and the milk was delivered according to contract? A. No, I think that if we got the bid, I think Cameron Peck took it upon himself to notify the divisions that we got the bid, and that was all there
472 was to it. That is what we had division managers for.

Q. Did you know whether or not when you purchased Westbrook Farms if you were supplying milk to the County Hospital? A. I believe we were.

Q. Do you know how long Bowman continued to serve the County Hospital? A. I don't know.

Q. Was the amount of milk which they furnished the County Hospital, would it be substantial?

Mr. Tierney: That is objected to.

The Court: Aren't the contracts in evidence anyway, the amount on them? They were stipulated at the pretrial conference, weren't they?

Mr. Tierney: What is "substantial"? It calls for comparison, anyway.

Mr. Hart: There is nothing in there to show volume.

The Court: There is not?

Mr. Hart: No.

The Court: Well, let him state what the volume is, if he knows.

473 By the Witness:

A. I don't know.

By Mr. Jinkinson:

Q. Was it substantial? A. I don't know. It was back in 1941.

The Court: What you and I regard as substantial, that may be different. If we could find out what it is, I would be interested.

By Mr. Jinkinson:

Q. Was Westbrook Farms supplying all the milk needed at the hospital? A. That I couldn't say. I wouldn't have any way of knowing.

Q. Do you know how long Bowman continued to serve the County Hospital? A. No, I don't.

Q. Do you know whether or not the supplying of milk to the County Hospital was subsequently, that is, after the acquisition of Westbrook Farms in 1941, whether it was divided or alternated with any other company?

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Mr. Hart: If the Court please, as far as that is concerned, that is shown by the pretrial stipulation.

474 The Court: Yes, all the bids are listed here, and that is in evidence.

Mr. Hart: And who the successful bidder was at that time is underlined.

The Court: Yes, that is in evidence.

By Mr. Jinkinson:

Q. Mr. Eggleston, did you do any work in connection with the submission of bids to the Glenview Naval Air Station? A. No, sir.

Q. Did you discuss a submission of a bid with anyone in the Bowman Company? A. I think that that was one of the bids that was handled between Mr. Curtin and Mr. Peck.

Q. Did you discuss Glenview—

Mr. Ball: May I have that answer read?

The Court: You may read it.

(The record was read by the Reporter.)

By Mr. Jinkinson:

Q. Did you discuss the furnishing of milk for the formulation and submission of any bids to Glenview Naval Air Station with anyone outside the Bowman organization? A. I can't remember at this time.

475 Q. Did you have a discussion concerning it with Mr. Peck? A. I don't remember having any discussion at that time. I believe that they were at one time—at one time he was critical because we had lost the bid there.

Q. Did you hear such a discussion, that is, of Mr. Peck being critical of the loss of the Glenview business at a Sales Committee meeting of the Bowman Company? A. It is hard for me to remember everything that was discussed 10 or 12 years ago.

Q. Do you know to whom the business was lost?

Mr. Ball: May I object on the ground that I believe you are now inquiring about an institution that is not one of the public institutions named in the complaint, and it is now within the Chicago area.

The Court: May I have the complaint? I think that is correct.

By Mr. Jinkinson:

Q. Did you hear a discussion with reference to the loss of milk business to the Great Lakes Naval Air Training Station?

The Court: Are you withdrawing the other ques-
476 tion?

Mr. Jinkinson: Yes. I withdraw the other question.

Mr. Hart: The same objection, if the Court please. I think they are talking about the same thing. He says Great Lakes Naval Air Station.

The Court: You mean Great Lakes Naval Training Station, Great Lakes, Illinois?

Mr. Jinkinson: Yes.

The Court: That is what he is inquiring about.

Mr. Hart: I appreciate that.

By Mr. Jinkinson:

Q. Did you hear such a discussion between Mr. Peck and Mr. Buthman at a Sales Committee meeting? A. I don't recall any such discussion.

Q. Did you hear any discussion relative to the loss of business by the Bowman Company to a "certain competitor"? A. I don't remember.

The Court: Take a recess of 10 minutes.

(A short recess was taken.)

477 The Court: You may proceed.

Mr. Jinkinson: Your Honor, I would like to interrogate Mr. Eggleston with reference to his activities concerning bids submitted to Glenview Naval Air Training Station for the purpose of impeachment. He denies he had anything to do with institutional bidding. I have some documents to show he did have which refer to institutional bidding.

The Court: If you can do that with reference to any institutions embraced in this suit, I will permit you to go ahead.

Mr. Jinkinson: But not if it is outside?

The Court: No, because this trial will be long enough without going outside of the complaint.

By Mr. Jinkinson:

Q. Mr. Eggleston, I show you Government's Exhibit No. 60. Will you state what that is? A. It is a copy of the committee minutes of August 4, 1942.

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Q. That is a document which you received in the ordinary course of business when you were at the Bowman
478 Company? A. That is right.

Q. One of the documents which went with you when you left Bowman? A. Yes.

Q. Were you present at the meeting? A. Yes.

Q. The meeting was held August 4, 1942? A. That is correct.

Q. I direct your attention to paragraph 6. While you have the document will you read paragraph 16?

Do you know whether or not Ridgeview was making any bids to institutions at that time? A. I don't recall whether they were or not.

Q. What various units of the Bowman Company were submitting bids, do you know? A. I know some of them. I doubt very much whether I could recollect all of them.

Q. Will you tell us some? A. Central Wholesale.

Q. Were they submitting a bid in behalf of Bowman to an institution within their area? A. Yes.

Q. And the same way with other divisions of the Bowman Company, they were submitting a bid to an institution
479 stationed or being within the boundaries of their district, their division? A. That is correct.

Q. So that the purpose of the procedure as outlined in paragraph 6 of Exhibit No. 60 was to correlate these bids at the headquarters of the Bowman Company, is that right? A. I don't know what Mr. Peck had in mind when he mentioned that at the sales committee meeting.

Q. Did he just mention it, or did he discuss it at any length? A. I can't remember any discussion. That happened twelve years ago. I can't remember all these discussions at these meetings.

Q. What did Mr. Buthman report concerning Great Lakes? A. I can't remember what he brought up twelve years ago.

Q. Who is the "certain competitor" designated in this minute? A. I would not know.

Q. Was it Wanzer Dairy Company? A. I can't remember who he was referring to.

Q. Did Wanzer share in the business shortly after this meeting of August 4, 1942 with Bowman at Great
480 Lakes? A. Not with my knowledge.

The Court: In any event, that will show in the bids that we have in the pre-trial order.

Mr. Jinkinson: I believe it will probably show.

The Court: It is a matter of argument.

By Mr. Jinkinson:

Q. Did you discuss subsequent to August 4, 1942 with anyone from the Wanzer Company the division of business at Great Lakes? A. I can't remember having any discussions.

Q. Mr. Eggleston, were you served with a subpoena duces tecum recently in this matter? A. Yes.

Q. You were asked to produce any committee meeting minutes you may have now in your possession. A. Yes, that was served on me Friday.

Q. Have you made a search for any material you might have in your possession? A. I have absolutely nothing in my possession.

Q. At the time you left the Bowman Company I believe you testified that you took with you a box showing the names and addresses of cards of wholesale stops of the Bowman Company, is that right? A. That is right.

481 Q. Together with these minutes of these committee meetings? A. These minutes were in my brief case.

Q. They went with you, however? A. Yes.

Q. They were found at your house. They were found by you at your house? A. Yes.

Q. At the time you left in 1943 did you have in your possession any other records of the Bowman Company that you either took with you or had in your possession at the time you quit? A. Not that I can recall. I didn't know I had the minutes in the brief case until I took the brief case out and was going to use it five or six years later.

Q. Did you have any discussion with anyone in 1946 or 1947 with reference to any records you had in your possession in your home?

Mr. Tierney: That is objected to.

The Court: Overruled.

By Mr. Jinkinson:

Q. —records of the Bowman Company? A. I don't remember whether I did or not. I know Mr. Adamson

482 gave me some of his personal papers to keep there if that is what you are referring to.

Q. Did you have a discussion with Mr. Adamson with reference to them? A. I believe I did.

Q. His personal records or records of the Bowman Company, which? A. He told me they were his personal records.

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Q. Were they records of the Bowman Company, however? A. I don't know, I never looked at them.

Q. What did you do with them? A. I believe I turned them over to Mr. Hart, Sr. and he said that he would see that if Mr. Adamson wanted them he would get them.

Q. How many records were they? A. I don't know. There was a small carton and what was in there I don't know. I never opened it.

Q. Did you know how you came into possession of them? A. Mr. Adamson asked me to take them home with me.

Q. About when? A. I think that was way back in 1936 or 1937.

Mr. Hart: If the Court please, I move to strike this testimony about those records, if it is way back in that time.

483 The Court: It is prior to 1940. It may be stricken.

By Mr. Jinkinson:

Q. Mr. Eggleston, I show you a document marked Government's Exhibit No. 61. Will you state what that is?

Mr. Jinkinson: We don't have a copy for you. We will let you see the original in a few seconds.

By the Witness:

A. I believe that is a letter that Mr. Peck sent out to the divisions in regard to the price of half-and-half at the time we put it on.

By Mr. Jinkinson:

Q. It is dated January 4, 1943 and it is on the letterhead of the Bowman Dairy Company. A. That is correct.

Q. It appears to be a form letter, does it not? A. Yes.

Q. Your name appears as the first one on the sales committee as manager of milk sales. A. My name is typewritten down here, but down in the corner the initials "D.C.P.", Cameron Peck, by "M.T.", Margaret Tobiason, his secretary.

484 Q. Was it about this time or shortly prior thereto that paper was brought into the market in the Chicago area?

Mr. Ball: May we see the letter so we can fix the date.

Mr. Jinkinson: I think I said January 4, 1943.

Mr. Hart: If the Court please, I don't know that it is significant, but paper has been in the Chicago market since the 30's, at least this market area.

The Court: What do you want to bring out? When the paper began to be used, or do you have some other point?

Mr. Jinkinson: I have some other point, your Honor.

The Court: I will let you go ahead subject to a motion to strike if it is not material.

What is the answer to the question?

(Last question read, as follows:

"Q. Was it about this time or shortly prior thereto that paper was brought into the market in the Chicago area?")

485 By the Witness:

A. No, I believe paper was brought in several years prior to that.

By Mr. Jinkinson:

Q. How long? A. As near as I can recollect I think paper came in along about 1938 or 1939. It came in at the time the Dean Milk Company started. If you can fix that date that is the date we came out with paper.

Q. When did Bowman first use paper in this market, do you know? A. They came out with paper the same day the Dean Milk started distribution in this market.

Q. And did Borden come out the same day also? A. You will have to ask the Borden Company about that.

Q. You knew nothing about it? A. No.

Mr. Ball: It can be stipulated the Borden Company started using paper the same time.

Mr. Jinkinson: On the same day?

Mr. Ball: I think so, the same day.

Mr. Jinkinson: If you will so stipulate, it will be
486 satisfactory to the government.

Mr. Ball: That stipulation only relates to the city of Chicago. Borden was selling paper in the suburban area.

Mr. Hart: If the Court please, may I say a word by way of explanation?

Everybody had been selling in the suburbs. It was not allowed under the Health Department rules until a certain time in the city of Chicago. They all came in at the same time after the Health Department rule was changed.

Mr. Jinkinson: Will counsel also stipulate it was necessary for Dean Milk to enjoin the City from enforcing its rules and regulations?

Mr. Ball: We will stipulate the day in which paper appeared in the city of Chicago is the day in which the in-

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junction sought by the Dean Milk Company against the authorities restraining the restriction on the use of paper became effective.

The Court: Very well, it may be so stipulated.

Mr. Ball: And that occurred, I think, in 1939.

487 The Court: Very well.

Proceed.

Mr. Hart: We, therefore, renew our motion about striking the matter.

The Court: Yes, I can't see the materiality in view of that stipulation.

Mr. Jinkinson: I will withdraw the question, your Honor.

The Court: Very well. It may be stricken.

By Mr. Jinkinson:

Q. When Dean came into the Chicago area with paper did you have a discussion with Mr. Phillipi or Mr. Adamson with reference to the use of paper?

Mr. Ball: Object to this as outside the scope of the issues in the complaint, the date.

The Court: What is it you want to bring out?

Mr. Jinkinson: I just want to bring out that they had a discussion with Mr. Adamson and Mr. Phillipi with reference to it.

The Court: About what? What is it you want to bring out?

488 Mr. Jinkinson: Just a second, please.

Mr. Hart: If the Court please, as I recollect the witness' testimony it was that Mr. Adamson left the company in 1938 or 1939. So again we go back to something—

The Court: I don't know what it is they want to bring out. I can't rule on it until I find out.

Mr. Jinkinson: I will withdraw the question.

The Court: Very well.

489 Q. Mr. Eggleston, I hand you a document marked Government's Exhibit No. 62 (handing a document to the witness). A. (The witness referred to a document and handed it back to Mr. Jinkinson.)

Q. Can you state what that is? A. That is a copy of the sales committee meeting of March 18, 1941.

Q. And it is a copy of a sales committee meeting that came to you in the course of business while you were at the Bowman Dairy Company? A. Yes, sir.

Q. And it left with you about the same time that you left the Bowman Dairy Company? A. Yes, sir.

Q. I call your attention to the last paragraph of page 1 of Exhibit 62 and continuing over to the completion of page 2. A. Paragraph 1?

Q. No, no. The last paragraph on page 1. A. (The witness referred to a document.)

Q. Are you reading more? I just wanted you to read that. A. I was reading these things that are marked.

490 Q. Oh. A. (The witness referred to a document and returned it to counsel.)

Q. Were you in attendance at this meeting, Mr. Eggleston? A. Yes, sir.

Q. And Mr. Phillipi was there? A. Yes.

Q. Mr. Larson? A. Yes.

Q. Mr. Peck? A. Yes.

Q. And what did you report with reference to Bowman and Borden being only given permission at the new Buick plant?

Mr. Ball: Just a minute. I object to it as not the proper quotation or paraphrase of the passage occurring in the sales committee meetings.

The Court: Well, he may state what he reported.

By the Witness:

A. I can't remember just what I did report.

491 I know that we were having trouble at the defense plants. They would not allow anybody in there unless they were finger-printed and had permission, and all such stuff as that.

And I think, as near as I can recollect, that they confined that to these two. It shows that they were going to allow in there instead of having everybody running through the defense plants. We were right in the midst of the war at that time.

Q. Did you have a conversation upon—did you report upon that conversation with Mr. Baril?

Mr. Ball: I object to any conversation with an agent of The Borden Company who is now dead.

The Court: Overruled.

Mr. Jinkinson: Of course, I have not finished the question.

I withdraw the half question and submit in lieu thereof the following:

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By Mr. Jinkinson:

Q. Did you have a conversation with Mr. Baril of The Borden Company concerning the service to the Buick plant with paper bottles?

Mr. Ball: Same objection.

492 The Court: To that, I will sustain it. The other was whether or not he made a report to the sales committee.

By Mr. Jinkinson:

Q. Did you make a report to the sales committee meeting of any conversation with Mr. Baril? A. I can't remember what happened twelve years ago; it is just humanly impossible.

Q. Mr. Eggleston, I hand you a document marked Government's Exhibit No. 63 (handing a paper to the witness).

Mr. Jinkinson: I thought the last one was 61. Did I make a mistake?

Mr. Kerr: It was 62.

By Mr. Jinkinson:

Q. Can you state what that is?

Mr. Jinkinson: We are going to have a copy for counsel. I will let you see it in a second.

By the Witness:

A. Why, that looks like a copy of the price, at the time of the price change, which was sent to the Kroger Stores.

By Mr. Jinkinson:

493 Q. It was a copy of a letter written by you? A. I would not remember.

Q. Well, it has the initials here, "C. H. Eggleston," and in the lefthand corner are the initials "H.H."

She was your secretary at the time? A. Yes.

Q. And you had the title Sales Manager? A. I had that title.

Q. I show you a document marked Government's Exhibit 64. Will you state what that is? A. That is a letter that was sent to the High-Low Stores at the time that we changed the price, I think in 1941.

Q. And in the lefthand part of the letter, at the bottom, is that your initials:

"H.C.E."? A. Yes, sir.

Q. And the dash, "H.H." is your secretary? A. That is correct.

Q. Mr. Eggleston, I hand you a document marked Government's Exhibit No. 65. (Handing a document to the witness.) A. (The witness referred to a document and returned it to Mr. Jinkinson.)

494 Q. Can you state what that is? A. That is a letter I sent to the National—

The Court: I did not hear the answer.

The Witness: I presume it is a copy of the letter that I sent out at the time of the change in price in 1941 to National Tea. But there is no initials on there.

By Mr. Jinkinson:

Q. It is signed— A. Yes.

Q. "H. C. Eggleston, Sales Manager"? A. Yes.

Q. This is a copy of the original? A. Yes.

Q. Now, was this document, Government's Exhibit 65 made in the course of business while you were employed by the Bowman Dairy Company? A. Yes.

Q. I hand you a document marked Government's Exhibit 66 (handing a document to the witness). A. (The witness referred to a document and returned it to Mr. Jinkinson.)

495 Q. Can you state what that is? A. That is a copy of a letter I sent to the National Tea at the time of the change in price in '41.

Q. And the exhibit has the initials in the lefthand side of the page, or lefthand side of the document, "H.C.E."? A. That is correct.

Q. Dash "H.H.," your secretary? A. That is correct.

Q. Was this document, Government's Exhibit 66, made in the course of business of the Bowman Dairy Company while you were employed there? A. Yes, sir.

Q. Mr. Eggleston, I hand you a document marked Government's Exhibit No. 67 (handing a document to the witness). A. (The witness referred to a document, and handed it back to Mr. Jinkinson.)

Q. Can you state what that is? A. This is another one of Cameron Peck's letters that he sent out.

Q. And that is on the letterhead of the Bowman Dairy Company? A. That is right.

496 Q. Signed by "Sales Committee, H. C. Eggleston Manager Milk Sales"? A. "D. Cameron Peck, Sales Coordinator.

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"E. J. Larson.
"R. W. Buthman."

The initials down on the lefthand corner are:

"D.C.P. by M.T."

Q. It is dated March 14, 1942? A. It is dated March 14, 1942.

Let me read this just a minute.

Q. (Handing a document to the witness.) A. (The witness referred to a document and handed it back to Mr. Jinkinson.)

Q. Mr. Eggleston, I hand you a document marked Government's Exhibit No. 68. (Handing a document to the witness.) A. (The witness referred to a document and handed it back to Mr. Jinkinson.)

Q. Can you state what that is?

Mr. Jinkinson: I don't have a copy of it.

By the Witness:

A. I believe that is a copy of the names and addresses
497 of all of our plants and men holding key positions, and the likes of that.

Q. It is an organization chart of the Bowman Dairy Company? That would be an appropriate name for it, would it not? A. I imagine that is what it was. I think it was a directory that they had of the employes, showing the position they held and their phone number in case you wanted to get in touch with them.

Q. It shows also the city bottling plants, and it shows also their country plants? A. That is correct.

Q. It shows the distributing stations? A. Yes.

Q. And other information? A. (No response.)

Q. Mr. Eggleston, I hand you a document marked Government's Exhibit No. 69 (handing a document to the witness). A. (The witness referred to a document and handed it back to Mr. Jinkinson.)

Q. Can you state what that is? A. That is another one of Cameron Peck's letters.

498 Q. On the stationery of the Bowman Dairy Company? A. That is correct.

Q. Did you receive that letter? Did you receive a copy of it? A. I don't remember whether I did or not. It is eleven years ago.

Q. You are listed as having signed the letter? Your name is listed on the letter? A. Let me see it.

Q. (Mr. Jinkinson handed a document to the witness.) A. No, I did not sign the letter. My name was typewritten on there, which Cameron was in the habit of doing.

But in the lefthand corner is DCP by MT; D. Cameron Peck by his secretary, Margaret Tobias.

Q. He wrote the letter? A. He wrote the letter.

Q. Mr. Eggleston, I hand you a document marked Government's Exhibit No. 70 (handing a document to the witness). A. (The witness referred to a document and handed it back to Mr. Jinkinson.)

Q. Can you state what that is? A. That is a copy
499 of the sales committee meeting of February 4, 1942.

Q. Is that a document that you received while you were working at the Bowman Dairy Company? A. I believe it is.

Q. And it is also one of the documents which you left when you left? A. That is correct.

Q. And is it a document made in the ordinary course of business of the Bowman Dairy Company? A. Yes.

Q. And it is a meeting of the sales committee for February 4, 1942? A. That is correct.

Q. And it shows you were in attendance? A. Yes.

Q. I direct your attention to paragraphs 1, 2 and 4 thereof. Will you read them, please (handing a document to the witness)? A. (The witness referred to a document and handed it back to Mr. Jinkinson.)

Q. What was the report you gave to the committee in paragraph 2 relative to the competitive situation, do
500 you recall? A. If I remember correctly, we were losing quite a few stops, and we asked the divisions to give us the list of all the stops that we had lost, and the amount that they were using, and also the number of new accounts we had and what they were paying.

Q. What did you do in an effort to regain the stops that you had lost? A. What did we do to regain the stops?

Q. Yes. A. Why, it is only natural that we tried to get them back.

Q. What did you do in trying to get them back? A. We would meet the stop whatever the competition was.

Q. Did you have a list of the stops which you actually lost, that is, the list of addresses of the stops? A. I believe at that time we asked the managers to turn in the lists so that the supervisor would know how we stood at the divisions, what accounts we were losing, and what we were getting back.

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Q. Did the list also show to what dairy you lost the stops? A. I don't remember any such notation.

501 Q. Was the Moraine Hotel a public institution? A. As near as I can recall it was a hotel in Highland Park.

Q. Was that a stop serviced by the Bowman Dairy Company? A. I know it was at one time.

Q. Was it being serviced by the Bowman Dairy Company in February, 1942?

Mr. Ball: I object to this as being outside the area of the complaint. Highland Park is not in Cook County.

The Court: Sustained.

Mr. Ball: It is—

The Court: Since I live there, I think I can take judicial notice of the fact that it is in Lake County.

It takes me entirely too long to get in and out every day. Unless you have some special reason for going into it, it is not in the area embraced by the complaint.

Mr. Jinkinson: The only purpose that we have would be for impeachment purposes. But I think you have

502 ruled that I can't use it for that purpose.

The Court: That is right.

By Mr. Jinkinson:

Q. Mr. Eggleston, do you know who owned the Hawthorn-Mellody Farms in 1942? A. I imagine it was Mr. Cuneo.

Q. Did you know Mr. Cuneo? A. I met Mr. Cuneo once.

Q. When did Hawthorn-Mellody get into the market again? A. As near as I can recollect, it was back in '37, '38. They started in Highland Park. They were out in Highland Park for a while, and then they moved into Chicago.

Q. Do you know the area designated in Chicago as North Shore? A. Why, I imagine it is all the North Shore towns there.

Q. Is that in Cook County? A. Some of the towns are, and some of them are in Lake County.

Q. Did Hawthorn-Mellody and Bowman Company

503 engage in a price war on the North Shore in 1942? A. I know that we—there were a couple of price wars out there. Just to name the exact date, it is hard to remember.

Q. Do you ever recall a truce that was entered into between Bowman and the Hawthorn-Mellody Company with reference to North Shore. A. The only truce that I can recall was the meeting that we had with them when we tried to stop the price war that was going on at that time.

Q. Where did the meeting take place? A. I already testified to that.

Q. Was that the one in reference to Lipsky? A. That is correct.

Q. Lipsky and Peters? A. That is right.

Q. That is the only meeting you had with them? A. Yes, that is the only one that I can recollect at this time.

Q. You had no meeting with Cuneo? A. No.

Q. Now, was there a complaint made to the sales committee that Cuneo was not observing the truce on the
504 North Side? A. I don't remember.

Q. Did you hear any instructions given to Mr. Heinz or Mr. Rehorst to call Mr. Peters with reference to the matter? A. I can't remember anything.

Q. Who was Mr. Heinz? A. Mr. Heinz, I think, was manager of Evanston.

Q. And who was Mr. Rehorst? A. He was manager of Highland Park.

Q. They were both in this area on the North Shore? A. Yes.

505 By Mr. Jinkinson:

Q. I hand you a document marked Government's Exhibit 71. Can you state what that is? A. That is a copy of the Sales Committee meeting of May 19, 1942.

Q. Made in the course of business of the Bowman Company? A. Yes.

Q. Did you receive it while working as a Bowman Company, while you were working at Bowman Company? A. I believe I did.

Q. Did that leave when you left Bowman? A. I believe it did.

Q. It left with you? A. Yes.

Q. I call your attention to paragraph 11 thereof on Page 2. A. Yes.

Q. Now, does that refresh your memory so that you can state what truce agreement was not observed on the North Side? A. No, sir, I don't know what Mr. Peck was referring to when he made that statement. He was supervising Highland Park and Evanston, I believe, at that time.

506 Q. Mr. Eggleston, did you ever make a report to the Sales Committee meeting of the Bowman Dairy Company with reference to night routes in the Chicago area concerning the delivery of milk? A. If I remember correctly, at that time there was a great many factories running to three shifts, and I think that I did discuss that

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possibility of putting on night routes, and taking care of the men that were working nights.

Mr. Ball: I object to this line of questioning, because it relates to retail and not wholesale.

The Court: For what it is worth, what is in may stand, but confine your examination to the charges in the complaint.

By Mr. Jinkinson:

Q. Were sales to factories considered retail or wholesale sales? A. Retail sales.

Q. All of them were retail sales? A. Yes, sir.

Q. What is the distinction between a wholesale and a retail stop? A. A wholesale stop is buying less than
507 retail price, is buying at less than the retail price.

Q. Is the price the only element of difference between the two? A. And the amount of volume.

Q. Which takes more? A. The wholesale stops. The retail factory routes, the man has to go through the factory and serve each man individually with a bottle of milk, and collect at the same time.

The Court: It sounds like retail.

Mr. Jinkinson: It sounds less than retail, your Honor.

The Witness: It is.

The Court: Maybe there is a third category.

Mr. Jinkinson: There must be.

By Mr. Jinkinson:

Q. Didn't you sell any milk to any commissaries or people who were running restaurants in defense plants? A. Yes.

Q. Were they considered wholesale stops or retail stops? A. The majority of them, if it was a dump stop, was classified as a wholesale stop, but they were served during
508 the day.

Q. None of them were served at night? A. Not to my knowledge.

Q. Were all night routes retail routes? A. Yes, I believe they were.

Q. All of them? A. Yes.

Q. Mr. Eggleston, I show you a document marked Government's Exhibit 72. Will you state what that is? A. That is a copy of a Sales Committee meeting of March 4, 1941.

Q. And that was one of the minutes that you received

while you were still employed at the Bowman Dairy Company? A. Yes.

Q. And it is one of the minutes you received in the ordinary course of business? A. Yes.

Q. And that was a copy of the minutes that left when you left the employment of Bowman? A. That is correct.

Q. Now, it shows that you were present at the meeting of March 4, 1941? A. Yes.

509 Q. I direct your attention to paragraph 4 thereof. A. Yes.

Q. Did you have a discussion with reference to the matter? A. Did I have a discussion?

Q. Yes, sir. A. No, sir.

Mr. Ball: I object to the question as dealing with a matter retail, not wholesale.

The Court: Sustained.

Mr. Jinkinson: Of course, this witness says they are retail, but the report of the Sales Committee doesn't say they were retail routes. It says they are night routes. I assume the Government could prove they were wholesale routes.

The Court: If the Government is able to do so, they haven't done it yet, and we are now examining this witness as of today, the state of the record today. The objection is sustained.

By Mr. Jinkinson:

Q. Mr. Eggleston, did you have any supervision of
510 stop buying while you were employed by the Bowman Company? A. What do you mean, supervision?

Q. Did you authorize it? A. We authorized our men when Dean come in with a discount to meet that type of competition, if that is what you are referring to.

Q. Dean came in the market prior to 1940? A. Yes, they did.

Q. And the only stop buying you authorized between 1940 and 1943 when you left was stop buying of stops which had been taken from you by the Dean Company? A. If any competitor went out and made an inducement, we gave our people permission to meet it in order to hold the stops, but there was very little of it done prior to the time I left.

Q. Did you ever authorize any of your solicitors or your managers to initiate stop buying? A. No, sir, I did not.

Q. Did you authorize any of your managers or solicitors to do stop buying other than as a competitive measure against your competition? A. Not that I can recollect.

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Q. Did you know of any time the Bowman Company
511 ever paid for business where there was no competition involved? A. No, sir.

Q. In these stops? A. No, sir, I don't recall.

Q. Did you ever hear any such report made at any Committee meeting? A. I can't remember.

Q. I show you a document marked Government's Exhibit 73 for identification. Can you state what that is? A. That is a copy of the minutes of March 25, 1941.

Q. Is that a copy of a minute that you received in the course of business while you were employed at Bowman? A. Yes.

Q. And were you in attendance at that meeting? A. Yes, sir.

Q. And it was held on March 25, 1941? A. Yes, sir.

Q. And did that minute, No. 73, leave when you left Bowman? A. I presume it did.

Q. It went with you? A. Yes.

512 Q. I direct your attention to paragraph 16, on the last page. Were you in attendance at the meeting, and did you hear Mr. Peck make a report, make the report set forth in paragraph 16? A. I can't remember of that report being made. If it was in the minutes, I suppose he did.

Q. Did he report that anyone else was attempting to secure the business of this stop? A. I can't remember that discussion, but if it is in the minutes, Cameron Peck probably made the report.

Q. Mr. Eggleston, I hand you a document marked Government's Exhibit 74. State what that is. A. That is a copy of a Sales Committee meeting of June 12, 1942.

Q. A copy of a Sales Committee minute which you received in the course of employment in the Bowman Company? A. I believe it is.

Q. That is also a minute that left when you left? A. That is correct.

Q. When you left the employment of the Bowman Company? A. That is correct.

Q. I direct your attention to Paragraph 14 on Page 2, Exhibit 74. Will you please read it?

513 Mr. Hart: Which paragraph is it?
Mr. Jinkinson: 14.

By Mr. Jinkinson:

Q. Do you remember making a report to the Sales Committee? A. I believe there was something mentioned there

at that time that if we had an opportunity buy any wholesale dairy, that we should consider it very seriously, something to that effect.

Q. Did you discuss any particular dairy at that time? A. Not that I recollect.

Q. Did you know Mr. McGuire, a Mr. McGuire in the dairy business in Chicago? A. Yes, sir.

Q. And what was his first name? A. What is that?

Q. What was his first name? A. Why, I knew a Mr. Dan McGuire, and I knew a Mr. Sims McGuire.

Q. Were both of them in the dairy business? A. I believe they were.

Q. With what company? A. The Beloit Dairy Company.

Q. Did you ever have a discussion with either one
514 of the McGuires relative to any action being taken by Cuneo in buying more volume on the Chicago market? A. I can't remember everybody I talked to, and what I talked about.

Q. Did Mr. McGuire make such a report to you? A. Did Mr. McGuire make a report to me?

Q. Yes. A. No, sir, Mr. McGuire never made a report to me.

Q. Mr. Eggleston, I direct your attention to paragraph 16 of Governm[illegible]t's Exhibit 74, and ask you to read it and see if that refreshes your memory. A. Well, that was common knowledge in the industry, that Cuneo was out looking for dairies to buy out, to get more volume.

Q. And why would Mr. McGuire discuss it with you? A. Well, I meet Mr. McGuire at the labor negotiation meetings, and that is nothing out of the ordinary for him to mention that he heard Cuneo was trying to purchase other dairies to increase his volume.

Q. What was the exact report he gave you, do you remember? A. He didn't give me any report. It was referred to there, that he mentioned that he heard Cuneo was trying to buy dairies to get additional volume.

515 Q. Did McGuire say anything to you with reference to Peters, who was President of Hawthorne-Mellody, as to his future plans, or anything with reference to buying volume for Cuneo? A. It is pretty hard to remember what was said 10 or 12 years ago.

Q. Mr. Eggleston, were you familiar with the sale of milk on the penny lunch program in the public schools of Chicago? A. Mr. Phillippi handled that up until the time of his death, and after he passed away that was turned over to Mr. Kettell.

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Q. Did you have anything to do with it at any time? A. No, not that I recollect.

Q. Did you ever have a conversation with anyone from the Borden Company with reference to bids on public schools in the Chicago area? A. What period are you referring to?

Mr. Ball: I object to it unless the time is fixed.

By Mr. Jinkinson:

Q. Between 1940 and 1943, when you were there with Bowman? A. No, I had no discussion with them be-
516 tween 1940 and 1943 in regard to the schools.

Q. Does that imply that you had some discussion prior to that?

Mr. Hart: I object to that.

Mr. Ball: I object to that as outside the scope of the complaint.

The Court: Sustained.

By Mr. Jinkinson:

Q. From September, 1940, to when you left the Bowman Company in June, was it June of 1943? A. June 1, 1943.

Q. You had nothing to do with the sale of milk by the Bowman Company to any public schools in Chicago? A. Outside of some of the schools were served by some of the divisions I was supervising, that is all.

Q. When you were Sales Manager, at the time you were appointed Sales Manager at the time you left in 1943, did you have anything to do with submitting bids to sell milk to the public schools of Chicago? A. No, sir.

Q. Did Borden and Bowman ever have a definite arrangement whereby they would bid on certain designated schools?

Mr. Ball: Objected to, unless the time of such ar-
517 rangement is placed.

By Mr. Jinkinson:

Q. Between the years 1940 and 1943? A. Not to my knowledge.

Q. Mr. Eggleston, I hand you Government's Exhibit No. 45, and direct your attention to the last paragraph on Page 9.

Does that refresh your memory as having had any conversation between the years 1940 and 1943 with Mr. Smaha

or Mr. Baril of the Borden Company? A. I had no conversation with Mr. Baril or Mr. Smaha relative to the schools between the year 1940 and the time I left. Mr. Phillippi left the company in the first part of 1941.

The Court: We will recess at this time until 10:30 tomorrow morning.

* * * * *

519 H. C. EGGLESTON, a witness, called on behalf of the Government, having been previously first duly sworn, resumed the witness stand, was examined and testified further as follows:

Direct Examination by Mr. Jinkinson (Ctd.):

Q. Mr. Eggleston, I just want to ask you a couple of questions to clear up the record of yesterday.

I asked you yesterday if you wrote Government's Exhibit No. 47. You say you did not write it? A. No.

Q. By writing it, I mean are you the author of Government's Exhibit No. 47? A. I am not.

Q. I don't mean that you manually wrote it. A. No, I am not.

Q. You are not the author? A. No.

Q. Mr. Eggleston, about how many times did you confer with or were you interrogated by the Federal Bureau of Investigation or an Agent from the Federal Bureau of Investigation? A. Why, I was hounded continually for

520 a year. They disturbed me—

Mr. Jinkinson: Your Honor, I move to strike the characterization of the witness, that he was hounded by anyone, particularly by the FBI.

The Court: Of course, that is a matter of opinion. It may be stricken. You may answer the question.

The question was: How many times were you interrogated by the FBI?

By the Witness:

A. I believe Mr. Neafsey called me at my office; he called me at home. He disturbed me at my home in the evening.

He called me on the phone, I would say, twenty-five or fifty times.

By Mr. Jinkinson:

Q. How many times did you actually have calls from the FBI? A. As near as I can recollect, I was called down

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there—I was out of town, and when I got home one of the men from the office had called there, and he said:

"The FBI was looking for you."

521 And got my family all excited, and the next day I got a call from the FBI asking me to come down and see them. I went down there.

As near as I can recollect I told them we were busy during the week, and I tried to come down on Saturday, and I think it was either Thursday or Friday when they called me and I went down there to the office.

Q. How many times were you interviewed by the FBI Agents after the original time that you had the first interview? A. Oh, I would say eight or ten times; maybe a dozen times personally, and twenty-five or fifty times called on the telephone.

Q. And was the interrogation always with reference to the matter under consideration here in this court? A. Why, at the time that I was called by the FBI they had bids from all of the Great Lakes and the institutions, and Mr. Neafsey asked me what I knew about those bids. And I told Mr. Neafsey the same thing I testified in this court, that I had nothing to do with those bids.

Cameron Peck handled Great Lakes.

522 Mr. Phillipi handled the schools.

Q. That was after 1940? A. Yes.

Q. Mr. Phillipi died in 1941? A. No.

Q. When did he leave the company? A. About 1941.

Q. He left the company in 1941? A. Yes.

Q. Who took care of the schools after Mr. Phillipi left the company? A. Mr. Kattel.

Q. Mr. Kattel? A. Yes.

Q. Do you know of any reason why the FBI would record inaccurately any conversation—

Mr. Hart: I object to that.

The Court: Wait until he finishes the question.

By Mr. Jinkinson:

Q. —any conversation that you might have had with them, or any conference?

Mr. Hart: I object to the question.

The Court: Sustained.

523 By Mr. Jinkinson:

Q. Mr. Eggleston, were you familiar with the method employed by the Bowman Company of paying for

stop buying? A. I heard of one when I was there, but there wasn't an awful lot going on at that time.

Q. But you were familiar with the method of payment, is that right? A. Yes.

Q. Whereby the manager of the branch would give the money to the solicitor—he gave his I.O.U.—and the solicitor would take the money to the store merchant, who would sign a receipt, and the solicitor would return the receipt, and get the I.O.U. out from the cashier? A. How that was handled, that was strictly between the division manager, and I had nothing to do with that.

Q. Now, the money that was paid for stop buying, how was it carried on the books of the Bowman Dairy Company? A. I had nothing to do with the accounting department or the auditing department.

Q. Do you know whether or not it was carried un-
524 der an item called "Trade Expense"? A. Trade expense or trade allowance, I imagine that is where it was carried.

Q. And how was that listed on the final yearly tabulations of the Bowman Dairy Company?

Mr. Hart: If the Court please, to aid things and hurry them along, I will stipulate that it was carried in their "Discounts and Allowances" in their general ledger.

The Court: Very well.

Does that satisfy you?

Mr. Jinkinson: Yes.

The Court: It is so stipulated.

By Mr. Jinkinson:

Q. I hand you an exhibit marked Government's Exhibit No. 75 for identification. Can you state what that is? A. I believe that is a summary of the sales and delivery and collection expense.

Q. Did you ever see that particular document before? A. I have seen one similar to it.

Q. Is that the document that you turned over to the Antitrust Division office, when you were interviewed by
524a one of the attorneys of the Antitrust Division? A. I don't ever recall of ever having turned this over.

Q. Your statement is that you did not turn it over? A. I cannot remember turning this over to them.

Q. Your statement is that you did not turn it over? A. My statement is I cannot remember.

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Mr. Hart: I object to that as arguing with the witness.
The Court: Sustained.

By Mr. Jinkinson:

Q. Did you ever turn a similar document over to them? A. I don't remember ever turning anything over to them. They told me that they had been through the Bowman Dairy Company's files and produced a lot of stuff. I don't know what they had. They had copies of a lot of that stuff.

Mr. Faris told me himself that he had went through the files and taken all of that stuff out of the Bowman
525 Dairy Company's files.

Q. Do you recall turning over a similar document to Government Exhibit No. 75? A. No, sir, I don't remember at any time turning that over or any similar document to them.

Q. You don't recall telling Mr. Faris that you had secured this document from someone in the Bowman Dairy Company, and that you had access to information occurring within the company after 1943, at the time you left? A. No, sir.

I had never met Mr. Faris until the time that we were over in Judge Barnes'. I did not know who he was until I was introduced to him.

526 Mr. Jinkinson: We don't have a copy of this, your Honor. It is the only copy we have. I don't know whether your Honor wants to see it or not.

The Court: Not until it is introduced.

Mr. Jinkinson: I will show it to counsel.

Mr. Hart: I don't know. I certainly know that the company is in the habit of having these made up. If it is a matter of whether documents of that sort were made up monthly, I believe they were monthly or quarterly, or something of that sort.

Mr. Jinkinson: The only thing I can say, Mr. Hart, is that Mr. Faris told me that the witness turned that over to him. The witness says he did not turn it over. He doesn't remember.

The Court: Do you want to introduce that?

Mr. Hart: If it has some purpose other than impeachment purposes, perhaps I can stipulate about it.

527 The Court: Do you want it?

Mr. Jinkinson: I was going to interrogate him, of course, about what knowledge he had of the affairs of the Bowman Company after he left in 1943, because, of course,

he had access to these files, and was receiving copies of information from the Company.

That is one purpose. And my first original purpose, however, was stipulated by Mr. Hart, that trade expenses went in under the Allowances and Discounts.

The Court: Then you don't need this for any other purpose?

Mr. Jinkinson: No.

The Court: You can ask him what relations he had with the company after he left there.

By Mr. Jinkinson:

Q. Did you have any relations with any one in the Company after you left there? A. No, sir, I did not. What is the date of this? There is a date on there. It will
528 state very clearly whether I had any access to them.

Mr. Jinkinson: The witness asked me the question. But I will tell the Court that Mr. Faris told me there was a date on the part that was torn off, and Mr. Eggleston tore it off when he turned it over to him.

The Witness: I wish to state that is an absolute falsehood. I had no connection with the Bowman Dairy Company or with anyone there after I left in 1943.

The Court: Go ahead with the examination. There is no date on this document now.

The Witness: If there was any date torn off, it was torn off by Mr. Faris, or by someone in your office. It was never torn off by me.

By Mr. Jinkinson:

Q. Then you admit you turned the document over to him? A. No, I never turned the document over to him.

Q. Mr. Eggleston, what is a commission route?

529 The Court: What?

By Mr. Jinkinson:

Q. A commission, c-o-m-m-i-s-s-i-o-n route? A. Well, the Union designated at one time any route serving stores or commissaries with bottled goods. We had to pay a commission on it.

Q. And was that classified as wholesale or retail route? A. Some was classified wholesale, and some retail. If it was that type of stop on a retail route, we paid a commission on it. If it was being served by a wholesale route, if the store was being served by a wholesale route, it was a Union rule we had to pay a commission on it.

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Q. What was a bulk route? A. A bulk route was a route that served hotels and restaurants, and the likes of that.

Q. Was that classified as a wholesale route? A. Wholesale bulk route.

Q. That was classified as wholesale? A. Wholesale bulk route.

Q. Was there a wholesale-retail route also? A. There was a wholesale bulk route, and there was a wholesale store route, and a retail route, and the retail routes handled
530 some stores.

Q. Why would a retail route handle some stores? Was it for convenience? A. Because they were small stores, and they were in a locality where it wouldn't be profitable to send a store truck out.

Q. A store that was taking maybe just a dozen bottles of milk a day? A. Yes.

Q. Would get its delivery off a retail route? A. Yes.

Q. In 1941, these sales that were made to factories, as you call them, bench deliveries, as I understand, a bench delivery was a delivery made by a delivery man to the bench for the man who was working? A. I never heard of that expression in my life, bench deliveries.

Q. Well, you said yesterday, I believe, that these factories were classified as retail routes, because the salesman went right through the factory and sold his wares as he went up and down the factory, is that right? A. Yes.

Q. And would he sell quarts of milk to the men in
531 the factory? A. Sometimes quarts. Mostly pints of milk, and pints of chocolate milk.

Q. What is a third of a quart? How is that classified? A. I believe when I was there we wouldn't allow the man to sell thirds of quarts throughout the factories to retail.

Q. Why was this? A. It was not profitable.

Q. Where did you sell the third quarts, in stores? A. I don't remember if they ever did. I can't remember of any occasion where we sold third quarts in a factory while I was there.

Q. Where would the third quarts be sold? A. Restaurants, commissaries, and the likes of that.

Q. And the restriction against selling a third of a quart, and half pints, was just because it was unprofitable, is that it? A. Yes.

Q. It was permissible, however, to sell quarts, half quarts, and anything above third quarts? A. Yes. Pints, yes.

Q. What is a dump stop? A. A dump stop, as a
532 rule, is where the factories won't let anybody go through, and they have a man there to handle the milk, and we sell the merchandise direct to them.

Q. How many dump stops did you have? A. I can't remember how many stops we had.

Q. Did you have more dump stops than you had retail routes? A. No.

Q. The retail routes were far more prevalent? A. Absolutely.

Q. What was the ratio, do you know? A. It would just have to be a guess. I would say that we probably wouldn't have 50 dump stops throughout the City of Chicago, classified as dump stops.

Q. Did you ever have any stops where both the retail salesmen and the store drivers were servicing the same factory? A. That might have been in some factories where the retail man was going through selling to the factory, and the wholesale man was selling the commissaries, or the restaurant in the place.

Q. Did this continue, or did you have a policy to
533 change it? A. We had no policy. We got into quite an argument with the Union about it.

Q. But the Company had no policy on it? A. We had no policy on it.

Q. Were any of these delivery places or stops classified wholesale or retail because of the number of points being delivered to one factory? A. No, the Union took it pretty much upon themselves, what they would classify as commission stops, and what weren't.

Q. You abided by the Union's decision at all times? A. Well, we were forced to. We went down to Washington before the War Labor Board on the very thing you are talking about, that we were forced into.

Q. Did you have any line of demarcation as, for example, 400 points being the line at which a store fell into a retail route or a wholesale route? A. No.

Q. Mr. Eggleston, I direct your attention to Government's Exhibit 74, the fifth paragraph on Page 1. This exhibit has been identified previously. I ask you to read that.

Mr. Hart: Paragraph 4?

Mr. Jinkinson: The last paragraph on the page.

534 The Witness: The last paragraph?

Mr. Jinkinson: Paragraph 5.

The Witness: Oh, 5. You said 4.

Mr. Jinkinson: If I said 4, I correct myself. I now say 5.

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By Mr. Jinkinson:

Q. Have you read this? A. Yes.

Q. Does it refresh your memory as to any discussion or conference you had at the Sales Committee meeting on June 12, 1942, with reference to bulk stops? A. I remember faintly there was some discussion along that line.

Q. Did you participate in that discussion? A. I believe I did.

Q. Was the agreement, was it the agreement of the Committee that some night routes or some factory routes would be classified as commission routes and dump stops? A. I remember, as near as I can recollect, we had some of our retail routes that had the large dump stops, and the factory, and they spent all of their time in the factory and neglected their retail routes, so we decided that we would put those stops on the store wholesale routes, and the Union compelled us to pay the retail man a commission for six months on the stops we took away.

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Q. When you put them on store wholesale routes, they then were classified as wholesale? A. Yes.

Q. And some of them were night routes also, weren't they? A. The store?

Q. Yes, some of those factories, some of those factory deliveries that you were making? A. Not any dump stops. We had no dump stops at night, to my knowledge.

Q. On the retail routes which you said you classified? A. Well, we had some retail factory routes. They were very few. I would say that there was not probably six or eight in the entire City of Chicago that went out and served factories at night.

Q. Six or eight that are classified as wholesale routes? A. No, classified as retail.

Q. Are you prepared to say, Mr. Eggleston, that every night route that you had was a retail route? A. To my knowledge, every retail route we had was a retail route.

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Q. Did that apply also to the Chrysler Factory? A. The Chrysler factory was served by the South Side, and I had no supervision of that.

Q. You had no supervision of that even when you became Sales Manager? A. No. Let us get this right. While I was Sales Manager, I supervised three divisions. That was, Central Wholesale, Forest Stores, and Elston Store Division.

Q. That is when you were Sales Manager of the Bowman Dairy Company? A. Yes.

Q. And who was Sales Manager with the rest of Bowman's products? A. I was Sales Manager, but I did not—those were the only three divisions I supervised. If I remember correctly, I think Mr. Larson supervised the South Side.

Q. Did you have another Sales Manager named, besides yourself, and D. Cameron Peck? A. Mr. Phillippi was Sales Manager up until the time he left in 1941.

537 Q. Then you were Sales Manager after that? A. I had the title of Sales Manager, but I didn't have the authority, if that is what you are trying to get at.

Q. Then as Sales Manager in name, you were only really Sales Manager for three divisions of the Bowman Company? A. Yes.

Q. And someone else was Sales Manager for the rest of the Company? A. No, they were supervisors.

Q. Who was Sales Manager? A. I was Sales Manager in name only, and we had supervisors that supervised the other parts of the City.

Q. But the supervision by the other men like Mr. Larson, and those other men were not coordinated with any effort that you were in, is that right? A. We all worked together on sales, yes.

Q. Do you know whether or not the Bowman Milk Company made any deliveries to the Chrysler plant at night? A. I can't remember whether they did, or not. I knew

538 very little about the Chrysler. I know we got into Union difficulty out there several times.

539 Q. You don't know anything about the delivery of milk to the Chrysler Plant, is that right? A. What I heard about the Chrysler Plant, if I remember correctly, it was we had it on a bulk wholesale route and the union came in and compelled us to pay a commission. There was quite a controversy about it at the time.

Q. Was it discussed in the committee? A. Discussed at the committee?

Q. Yes. A. It was discussed with the union officials plenty often.

Q. Was it discussed at your committee meetings? A. It might have been. I can't remember what was discussed ten, twelve years ago.

Q. Mr. Eggleston, I show you Government Exhibit 49 which has previously been marked for identification and refer you to paragraph 12. You were in attendance at the meeting, were you not? A. Yes.

Mr. Hart: Paragraph 12?

Mr. Jinkinson: Yes, page 2.

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By Mr. Jinkinson:

Q. Did you hear Mr. Larson make his report? A.
540 I can't remember what transpired ten or twelve years ago.

Q. Do you recall a price war or the serious competitive situation that the Bowman Dairy Company got into with the Capitol Dairy Company in the 79th Street area? A. I can't remember that discussion. I can't remember every conversation I had ten or twelve years ago. You should know that without asking me about it.

Mr. Jinkinson: Now, your Honor, I don't think—
The Court: The remark may be stricken. Proceed.

By Mr. Jinkinson:

Q. I am asking you, do you recall independently— A. I told you I cannot remember any such conversation.

Q. You, as sales manager of the Bowman Dairy Company, would be apprised, would you not, of any price war that you were in with the Capitol Dairy Company in the 79th Street area? A. I might hear about it.

Q. Would the supervisor, Mr. Larson, consider it serious enough to report it to you? A. I don't know whether he would or not. He didn't say he reported it to me.
541 Maybe he was telling Cameron Peck, I don't know.

Q. You were at the committee meeting, were you not? A. I was at the committee meeting, yes.

Q. But you can't remember hearing it? A. I can't remember taking any part in any such discussion.

Q. The only thing you heard at these committee meetings were the things said to you, addressed to you. Did you hear anything that was addressed to Mr. Peck or Mr. Buthman or anyone else in the room? A. Cameron Peck had a great habit of going back to the office. He'd write up the sales committee meetings to suit himself.

Q. Then they were circulated among the officials of the Bowman Dairy Company? A. Not the officials; each member at the sales committee got a copy.

Q. Each one that was present. Was Mr. Peck, the president of the company, given a copy of it? A. Not to my knowledge.

Q. After you received a copy of the sales committee meeting, would you read it? A. Very seldom.

Q. You weren't interested enough in the affairs of
542 the company to read the recording of the activities of the company? A. I was very much interested in

the affairs of the company, but I was not interested in Cameron Peck's definition that he put on a lot of things.

Q. You weren't interested enough to know whether it was correctly recorded, and what you said, the instructions you gave at these meetings? A. I told you, and the rest of the committee will agree with me, Cameron Peck made no notes of the meeting and he went back and put in those meetings whatever he thought he could remember.

Q. Mr. Eggleston, isn't it true that Mr. Peck's secretary also attended these sales committee meetings and took notes? A. No, it is not true. She never attended a meeting that I was present at that I could remember.

Q. Did you ever see Mr. Cameron Peck there with a paper and pencil, making notes? A. No, sir.

Q. Never on any occasion? A. No, sir. He always came in with a briefcase and a lot of papers. I don't know what he had in there.

Q. When you attended these meetings, would you
543 sit around the table? A. Yes, we had a table there.

Q. Did you preside at the meeting as sales manager? A. Not necessarily.

Q. Did anyone preside? A. Well, we went around the table and each one brought up whatever they had on their mind.

Q. When you were there you, as the sales manager, did you always bring your suggestion first and it was followed by the other members of the committee? A. I can't remember whether I did or not. I might have.

Q. Mr. Eggleston, what was the rule of Bowman Dairy Company with reference to expenditure of a sum of money over a certain amount with reference to securing approval from the Board of Directors for the expenditure? A. I can't recall.

Q. Don't you know that the rule was that if anyone expended more than $500 they had to secure permission or approval from the Board of Directors? A. I know any time if I had anything like a purchase of a new automobile or a truck I had to bring it up to the Board and get their approval of it.

Q. Were you a member of the Board of Directors?
544 A. I didn't know there was any rule on the book.

Q. All right, then, answer the question.

Did you know there was any rule for any amount of money to be expended that it had to be approved by the Board? A. I heard after I left there there was some rule, just in the common gossip, if that is what you are referring to.

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Q. No, I am referring to the question I asked you. I will ask it again. A. I don't know what rules the Bowman Dairy put in there prior to the time I went in there as director.

Q. Did you feel you were bound by the rules of the company that were enacted before you became a member of the Board of Directors?

Mr. Hart: I object to this.
The Court: Sustained.
Mr. Hart: What the witness' opinion was.
The Court: Sustained.
Mr. Ball: Objected to unless the question is limited—
The Court: I am sustaining the objection. There is no question.

Mr. Ball: I beg your pardon.

545 A. Yes.

Q. You didn't know that rule was in existence? I am talking about the rule if you spent more than $500 you had to secure permission from the Board of Directors. You didn't know that? A. If they had such a rule, it probably was there.

Q. Did you know it? A. I was only on the Board of Directors a short while.

Q. For how long? A. Oh, I think I was elected maybe in 1937, 1938, something like that.

Q. You served until 1943? A. June 1, 1943.

Q. That is a short time, six years. A. I don't know what rules they made before I got in there.

Q. Mr. Eggleston, I submit the question, during the time you served as a director of the Bowman Dairy Company, did you or did you not know that it was a rule of the Bowman Company that to expend more than $500 by anyone in the organization, it must first be approved by the Board of Directors of the Bowman Dairy Company? A. Well, it was always my policy—

Q. Did you know, yes or no?

546 By Mr. Jinkinson:

Q. Mr. Eggleston, would an expenditure of $240,000 by anyone from the Bowman Dairy have to be approved by the Board of Directors, do you know? A. I would think so.

Q. Mr. Eggelston, you testified yesterday, I believe, I don't want to repeat this, but I believe you testified that you sat in in a conference of Mr. Phillipi, Mr. Kullman, yourself and Mr. Buckley with reference to the purchase

of Westbrook Farms by Bowman? A. As near as I can remember, yes, we did.

Q. I believe you said you sat in on the first exploratory conference and that was all you had to do with the purchase of Westbrook by Bowman? A. I might have sat in with Mr. Kettel sometime later in arranging the stops, but what division was to serve what stop—

Q. After the company was purchased, you mean? A. No, I think shortly before. We took the company, I said, in maybe—whether Gold was present, Stone, and Mr. Buckley, and they showed us each account and how much each account was taking, and the likes of that.

Q. Were you ever told by anyone in the organization how much money Bowman did pay for Westbrook Farms?

547 Mr. Ball: Objected to as not the best evidence.

The Court: Overruled. He may answer, if he knows.

By the Witness:

A. I think the information I got was from Mr. Buckley. I know that Mr. Buckley told me that he just got enough out of it to pay the liability; that his investment he put in there was a total loss.

The Court: Mr. Jinkinson, Judge Sullivan has just come up to see me and I will take a short recess. We will recess.

(A recess was taken.)

548 (The witness resumed the witness stand.)

By Mr. Jinkinson:

Q. Mr. Eggleston, when did it first come to your attention or your knowledge that Bowman had purchased the Westbrook Farm? A. Well, I think that the—Do you mean—Are you asking me to name the date?

Q. I am asking you to tell me the place first. A. I think it was 140 West Ontario Street.

The Court: That was covered yesterday afternoon. Is there additional matter that you want to go into?

Mr. Jinkinson: Yes, I just want to ask one question, or two questions about it.

The Court: Because yesterday afternoon, at page 611 of the transcript, it says:

"Where did this meeting take place?"

"I believe at 140 West Ontario Street."

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Mr. Jinkinson: That was the first meeting that he had, and that was just exploratory.

I asked him when he was first apprised of the
549 fact that Westbrook Farms had been purchased by the Bowman Dairy Company and the sale had been consummated.

The Court: After those negotiations?

Mr. Jinkinson: After this deal was negotiated.

The Court: Very well.

By Mr. Jinkinson:

Q. Who told you that Bowman had purchased the Westbrook Farms? A. What was the date of that purchase? 1942, wasn't it?

Q. 1941, I believe.

Mr. Jinkinson: I believe counsel stipulated it was October 15, 1951.

Mr. Ball: It is set forth in the pretrial order.

Mr. Hart: I think it is October, 1941. I don't remember the exact date in October.

By the Witness:

A. If I remember correctly, it was either Francis Kullman or Gullens, who told me that the deal was closed, and that we were taking over the business the following day.

550 By Mr. Jinkinson:

Q. Now, did the matter come up at a board of directors meeting at which you had an opportunity to vote on the purchase? A. No.

I will tell you, as a rule, I was out a great deal. I wasn't in the head office maybe two or three hours a day, and they would go into a huddle in Mr. Dr. Peck's office, and those things would be settled without me being present.

I think the records would show whether I was present or not.

Q. And they could call a board of directors meeting on a moment's notice? A. Oh, yes. Yes.

Q. And they would have whether you were there or not? A. I would not say a board of directors meeting. If they had something that must be decided by the board of directors, they would get together. They would get the directors together, that is, at the head office at the present time.

Q. Well, did you attend all of those meetings, or
551 did you miss a lot of them? A. Oh, yes, there was quite a few.

Q. And did you miss the one at which the board of directors voted on the question of acquiring Westbrook Farms? A. I can't remember being present at that meeting.

Q. Not being present, then did someone tell you that the board had voted the purchase of Westbrook Farms? A. I think Mr. Kullman told me the deal was closed and we were taking over the business the following day.

Q. That was the first knowledge that you had that Bowman had purchased Westbrook; that the sale had finally been consummated? A. I knew that we were negotiating for it.

Q. I am asking you: Is that the first information that you had that the sale had been consummated? A. As near as I can recollect, yes.

Q. All right.

Who if anyone, would have made a cost study of the Westbrook Dairies? A. Well, I think that would be made by Mr. Gullen's department at that time.

552 Q. And did Mr. Gullens to your knowledge make a report on his study, cost study, of the Westbrook Dairy? A. I don't know. He made no report to me on it.

Q. When Mr. Kullman, who informed you that Bowman had purchased the Westbrook Dairy and was taking it over the next day, did he tell you the purchase price? A. I can't remember whether the price was discussed or not.

Q. Were you ever apprised of the price that the Bowman Company paid for Westbrook Dairy? A. Well, Mr. Buckley told me what price he received.

Q. You talked to Mr. Buckley after the sale was consummated? A. I talked to him after the sale was negotiated, and I talked to him during the negotiations.

Q. Did you talk to him after the sale was completed? A. Yes.

Q. And Bowman had now taken over Westbrook Dairy when you talked to him, is that right? A. Yes.

553 Q. Did he tell you how much he received for it? A. Not in dollars and cents.

He just said that he barely got enough out of it to pay the liability, the liability.

Q. Mr. Eggleston, I will ask you this question:

Did anyone, either connected with the Bowman Dairy Company or anyone outside of the Bowman Dairy Company, ever tell you, or did you ever secure any information how much the Bowman Dairy Company paid for the purchase of the Westbrook Farms? A. I heard rumors to that effect, yes.

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Q. But you as a director were never told how much Bowman Dairy Company paid for the Westbrook Farms? A. I don't recall ever being apprised of what the final purchase price was.

I know what their asking price was when they started because I sat in that meeting.

Q. Did you know, or were you ever informed by anyone of the Bowman Dairy Company or outside the Bowman Dairy Company what Bowman paid for Westbrook Farms? A. I heard what they were supposed to pay.

Q. From whom did you hear it? A. Oh, I think
554 Mr. Kettell came to me with the story.

Q. And what did he tell you? A. He asked me if it was true that Bowman Dairy Company paid such and such a price.

Q. And what did you tell him? A. I told him that I didn't know. I didn't know what the final negotiations were.

Q. What else was said with reference to it? A. That is about all I can remember at this time.

Q. Now, Mr. Eggleston, I will ask you, do you know of anyone in the Bowman Dairy Company or outside the Bowman Dairy Company ever telling you how much the Bowman Dairy Company paid for Westbrook Farms? A. I just told you.

Mr. Hart: If the Court please—

Mr. Jinkinson: I asked him a question, and he said, "I heard."

I want him to say whether he heard the amount. If he did not, that is all right. That is the end of the question. But I want to get an answer.

By the Witness:

555 A. I told you that Mr. Kettell came to me with the information; he is with the Bowman Dairy Company.

The Court (addressing the witness): Answer the question yes or no, if you know how much was paid. If you don't know, say you don't know.

By the Witness:

A. I don't remember of ever receiving notice what was paid for Westbrook Farms.

Mr. Jinkinson: He said that he doesn't remember. I just want him to say yes or no, but he tells me he doesn't remember.

The Court: If that is an answer to the question, I can't make him remember.

Mr. Jinkinson: I realize that. Can I get a yes or no answer? Can he say yes or no?

The Court: He says he doesn't remember. I think that answers the question.

Mr. Jinkinson: All right.

556 By Mr. Jinkinson:

Q. Mr. Eggleston, isn't it the truth that you were informed that a cost study had been made by cost accountants, or by accountants in the Bowman Dairy Company, and they had determined that the value of the Westbrook Farms, the physical assets, were worth $60,000? A. I never —

Q. Wait until I finish the question, please.

And that the Bowman Dairy Company paid $240,000 for the purchase of the Westbrook Farms. Did anyone ever tell you that? A. No.

Q. You didn't know that? A. No.

Q. It never came to your attention? A. I heard rumors after I left the Bowman Dairy Company what was paid for it.

Q. Who did you hear the rumors from?

Mr. Hart: I object to that.

By the Witness:

A. That was general gossip around the street.

The Court: Objection sustained.

557 By Mr. Jinkinson:

Q. Your statement, then, is that while you were working at Bowman Dairy Company, you did not know how much Bowman paid for Westbrook Farms, and you didn't know how much the Cost Accounting Department showed as to how much Westbrook was worth? A. No.

The Court: He answered both of those questions in the negative yesterday afternoon, at Pages 611 and 612 of the transcript.

Proceed to something else.

By Mr. Jinkinson:

Q. Mr. Eggleston, in 1940 were you or Mr. D. Cameron Peck, or someone else, supervising sales to the Great Atlantic and Pacific Tea Company? A. In 1940?

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Q. That is right. A. I was.

Q. And you had been supervisor of sales, Bowman Dairy Company sales, to the Great Atlantic and Pacific Tea Company, for a number of years? A. Yes.

Q. And you were acquainted with the personnel purchasing personnel at the Great Atlantic and Pacific
558 Tea Company? A. Yes, sir.

Q. Do you know Mr. Holdley? A. Yes, sir.

Q. Do you know Mr. George? A. Yes, sir.

Q. Who would you contact in your contracts with the Great Atlantic and Pacific Tea Company with reference to the sale of milk to A and P Stores? A. I think Mr. Cannon in the period that you mentioned was the Purchasing Agent of the dairy products at the time.

Q. And in 1940, 1941, '42 and '43, or between the period of 1940 and 1943, did Bowman have any contract, written contract with the Great Atlantic and Pacific Tea Company for the sale of milk? A. We had no written contract with the A and P at any time for the sale of milk, to my knowledge.

Q. So as far as you know, was there any oral understanding or written understanding with Great Atlantic and Pacific Tea Company that they would purchase a certain dollar volume of dairy products for any year, or any given period of time? A. There never was any agreement, or
559 never was any definite understanding to that effect.

Q. Did you have any agreement, either written or oral, with the Great Atlantic and Pacific Tea Company, that they would purchase a certain quantity of dairy products, not dollarwise, but with reference to quarts, gallons, pints and so forth? A. No, sir, that was never discussed with them at any time.

Q. And you did not have any firm commitment from them that they would buy either a certain dollar volume, or a certain tonnage? A. No, sir.

Q. Mr. Eggleston, the Great Atlantic and Pacific Tea Company had many stores throughout the Chicago area? A. Yes, sir, they had quite a few.

Q. Between 1940 and 1943, they had several types of stores, and some of them were supermarkets? A. That is correct.

Q. And some of them were special development stores? A. Yes.

Q. And some of them were just ordinary variety stores, grocery stores? A. That is right.

560 Q. Now, in servicing these stores of A and P, did the Bowman Dairy Company make deliveries directly to A and P stores? A. That is correct.

Q. They made, so far as you know, during this period under discussion, did they make any deliveries to warehouses of A and P? A. Only in regard to cottage cheese.

Q. In regard to fluid milk? A. Fluid milk was made direct to the stores.

Q. Did the Bowman Dairy Company have special trucks whose duty was to service only A and P stores? A. No, sir.

Q. Were A and P stores serviced from the regular Bowman Dairy trucks? A. Yes, sir.

Q. Did these trucks also service other competing stores of A and P from the trucks? A. Yes, sir.

Q. On the route on which the same trucks, or at the same time that the trucks would service the A and P stores? A. Yes, they were serviced the same day, yes.

Q. They were serviced from the same trucks? A.
561 Yes, sir.

Q. Now, did you ever make any cost study, or request anyone in the Bowman organization to make any cost study with reference to the cost of delivery of dairy products to A and P stores? A. No.

Q. Versus similar deliveries to competing stores of A and P? A. No, I never did.

Q. Do you know, Mr. Eggleston, of your own knowledge, whether or not Bowman delivery trucks delivered in many instances the same quantity of milk and dairy products, Bowman Dairy products, to competing independent stores as they did to A and P stores?

Mr. Ball: That is objected to as calling for the opinion and conclusion of the witness, and it is a conclusion as to which stores were competing; and the factual basis is not laid.

Mr. Jinkinson: I assume any grocery store in Chicago is competing with A and P.

The Court: I don't have the facts on the matter. I think the question is very broad. This is direct examination, although you have permission to cross examine the
562 witness, and I would rather you would get some more details instead of his conclusion.

By Mr. Jinkinson:

Q. Mr. Eggleston, did National Tea Company have grocery stores in Chicago? A. Yes.

Q. And were there other local chains operating in Chicago? A. There was Kroger.

Q. Kroger? A. Jewel.

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Q. Jewel Tea Co. They were all competing with A and P? A. I imagine so.

Q. Well, don't you know from your experience selling milk in Chicago, haven't you seen A and P stores, Kroger stores, National Tea Company stores, and many independent stores adjacent to A and P stores, seen them in the same neighborhood? A. I have seen them in the same neighborhood, yes.

Q. And weren't they all selling groceries? A. Yes, they were all in the grocery business.

Q. And you saw many independent grocery stores operating in the City of Chicago? A. Yes.

563 Q. And the Bowman Dairy Company was selling independent grocery stores? A. Yes, sir.

Q. They were selling the Great Atlantic and Pacific Tea Company dairy products? A. Yes, sir.

Q. Do you know whether or not Bowman Dairy Company trucks delivered the same quantity of milk at one time to independent grocery stores as they did to A and P stores? A. I would have no way of knowing what volume was served to the A and P in each individual store. I would get the total volume at the end of the month, or something like that.

Q. But you didn't know whether or not some independent stores took as much milk in one delivery from a Bowman truck as other similar A and P stores did? A. No, I would have no way of knowing.

Q. You made no investigation of that to ascertain whether or not that was being done? A. No.

Mr. Hart: If the Court please, I object to this general line of questioning.

Mr. Jinkinson: If the Court please—

564 The Court: Let him finish.

Mr. Jinkinson: I am sorry.

Mr. Hart: It was the subject of an action by the Government before Judge Barnes, where the contention was made that we had not afforded people buying equal volume with the A and P the same discount that we had afforded A and P.

Judge Barnes' direction to the jury at the close of the case was that they return a verdict in favor of the defendants, and I wish to move to exclude this general line of questioning about those things, on the contention that it is res adjudicata between the parties.

The Court: What is it you seek to bring out here? The same situation, that they gave a preferential discount?

Mr. Jinkinson: That is right.

The Court: To A and P?
Mr. Jinkinson: That is right.
The Court: Over the independent stores?
Mr. Jinkinson: That is right.
The Court: And you mean on wholesale deliveries of milk?
565 Mr. Jinkinson: Certainly.
The Court: Fluid milk?
Mr. Jinkinson: Yes.
The Court: Is that the same matter that was gone into in this other suit?
Mr. Jinkinson: In the first place, Judge Barnes' case was a criminal case. The second thing, it is immaterial whether or not the matter was gone into in another action. We allege that this is one of the means used in this conspiracy.
The Court: It is immaterial if it is res adjudicata. We will find out if it is or not. If this Court, by whatever Judge, has ever decided there was no such preferential treatment given, if so, I am bound by it, if it is the same period of time, and the same parties.
Can you answer the question?
Mr. Jinkinson: I cannot answer the question.
The Court: What was the decision in Judge Barnes, do you know?
Mr. Jinkinson: I have not read the transcript.
566 The Court: Was it a criminal case?
Mr. Hart: It was a criminal case.
The Court: Then the degree of proof is different there, although greater than it would be here.
Mr. Jinkinson: That is right.
The Court: Do you allege in your complaint such preferential treatment, specifically?
Mr. Jinkinson: Certainly.
The Court: As regards the A and P?
Mr. Jinkinson: We don't set out the A and P.
The Court: I know the general charge of the complaint, but I mean, you don't lay any stress on the A and P, and it is not spelled out?
Mr. Jinkinson: No. We don't specify anyone, your Honor.
The Court: The fact that the criminal indictment was decided in favor of the defendants is not res adjudicata of the question as to whether or not the preferential
567 discount was given to one purchaser as differentiated from another one.

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Mr. Hart: If the Court please, what Judge Barnes decided, and I can produce the transcript if necessary, at a later time, was that the general sales to the A and P as a corporate chain could not be compared to individual grocery stores whom the defendant, Bowman Dairy Company, sold milk to throughout the City.

The Court: On the evidence before him in the criminal case, he might well have come to that conclusion. There, of course, the only evidence, the evidence should be the best that the Government could produce at that time, and would have to convince the Judge and the jury beyond a reasonable doubt.

Here they merely have the burden of proof by a preponderance of the evidence. The degree of proof is different.

And, secondly, if there is such evidence, I haven't heard it yet, but if there is, it may well be that I will be
568 similarly persuaded. But I can't answer that until I hear it. And I think that insofar as it goes to a general charge in the complaint, I should hear what it is they have that they want me to know about it.

Mr. Hart: Very well, if the Court please. I will withdraw my objection.

The Court: Very well. You may proceed.

Mr. Jinkinson: Is there a pending question? Read the last question.

(The record was read.)

By Mr. Jinkinson:

Q. In 1940, September of 1940, were you paying A and P a discount? A. I believe we were, yes.

Q. And did that discount—what was the discount, do you know? A. If I remember correctly, I think it was 5 per cent. There were a number of dairies we purchased, we purchased a number of dairies in 1928 and 1929, and they were paying 5 per cent at the time we took them
569 over.

Q. And the discount continued up until the 1940 period? A. Yes.

Q. No change there? A. No.

Q. Now, the deliveries of milk, dairy products, to the A and P stores, they were wholesale stops, were they? A. Yes, that is right.

Q. Was there a change after 1940 in the amount of money which you paid the A and P, the amount of discount? A. I think there was a change made in 1942.

Q. Did A and P cancel out the Bowman Dairy Company as a supplier of milk? A. That is right.

Q. And when did that take place? A. I think it was in the Spring of 1942, probably May or June, somewhere along there.

Q. And who first informed you that A and P was discontinuing, was going to, or was about to discontinue, or had discontinued the purchase of milk from the Bowman Dairy Company? A. I was out of town. When I arrived and got back from a vacation, why, Mr. Larson called
570 me and said they had notice that the A and P was discontinuing service.

Cameron Peck had been over to see him, and he couldn't do anything with him. And this was on Friday night. And I knew they were all closed on Saturday, and I told him I would go in and see him Monday morning, and see what I could do.

Q. You told that to Mr. Larson? A. Yes.

Q. The Cameron Peck you speak of is the same D. Cameron Peck that you have discussed here before? A. That is correct.

Q. Did you make any attempt to get in touch with him and ascertain what conversation he had with anyone at A and P? A. I saw him at the Head Office Monday.

Q. Before you went over to see the A and P? A. No, it was after. I went right from home to the A and P.

Q. Mr. Eggleston, you say this incident happened in 1942? A. Yes.

Q. Do you recall how much money you paid, or the
571 Bowman Dairy Company paid the A and P for the previous year, 1941, on the 5 per cent discount plan, the total sum? Can you give us that? A. No, I have no way. It was 5 per cent on their sales, whatever their sales were.

Q. On all sales made of dairy products? A. I think so. I am not positive whether that was paid on the cheese or not.

Q. Did you go to the A and P offices on the Monday that you have stated, after you got back in town? A. That is correct.

Q. And you don't remember the date? A. No. It was in 19—I think it was June of 1942.

Q. You don't remember what day? A. No. It was Monday morning. I know it was on a Monday morning.

Q. And where were the A and P offices located? A. On—I think the address is 2640 North Pulaski Road.

Q. And whom did you see there? A. Why, I believe I talked to Mr. Cannon first, and then I talked to Mr. Holdley.

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Q. You talked to them together or individuallly? A. Individually. I talked to Mr. Cannon first, and I asked
572 him if he had any objection if I talked to Mr. Holdley.

Q. Mr. Holdley was President of the Mid-Western Division of the A and P? A. He was President of the A and P at that time.

Q. And Mr. Cannon was one of his buyers? A. Yes.

Q. What did Mr. Cannon tell you with reference to the discontinuance of the purchase of milk by the A and P? A. He told me he was going to discontinue. He told me it would be to their advantage to discontinue our service.

573 Q. Did he tell you anything else? A. No.

Q. Did you ask him why he discontinued? A. I asked him why.

Q. What did he tell you? A. He told me the same story, it was to their advantage.

Q. Was that the only information you could get from him? A. That was the only information I could get from him. I asked him if he had any objection if I went in and talked to Mr. Holdley.

Q. Did you go in and talk to Mr. Holdley? A. Yes, I did.

Q. Where did that conversation take place? A. Same time and same place.

Q. Same sequence? After seeing Mr. Cannon you saw Mr. Holdley? A. That is right.

Q. Who was present? A. Just Mr. Holdley and myself.

Q. Was the conference with reference to purchase of milk by the A&P from Bowman? A. Yes.

574 Q. What did he say and what did you say with reference to that? A. I told Mr. Holdley that I handled that account personnally since 1929 and we were in a position what anybody else could do if we had to meet the competition.

Q. What did he tell you? A. He said, well, he was sorry. He said they made a ruling and there was nothing he could do about it.

Q. Is that all he told you? A. That is all I can remember at this time.

Q. Did he mention anything about a competitor giving A&P a large discount than you were giving them? A. No, that is something the A&P would never do.

Q. What information did you gain from them as to why you lost the A&P account? A. It was to their advantage to give the business to somebody else.

Q. That is all he told you? A. Yes.

Q. What did you do next? A. I asked Mr. Holdley if he had any objection if I went to New York.

Q. What did he tell you? A. He said, "Well, that is entirely up to you, if you want to go.

575 Q. What did you do then? A. I got tickets on the train and went down to New York. I asked Dr. Peck if he would go along with me. I said I think that when we got down there I would like to talk to Mr. Hartford who was president at that time. I asked Dr. Peck to go along, "You being the president, it might give a little prestige in seeing him down there."

Q. You think it might impress the Great Atlantic and Pacific Tea Company? A. Yes, I thought so.

Q. Did you see Mr. Hartford? A. No. We got there and we talked to his secretary and his secretary said that he was out of town. They didn't expect him back for a number of days.

Q. Did you see anyone connected with the Great Atlantic and Pacific Tea Company? A. His secretary suggested we see Mr. Mylot or Mr. Befinger.

Q. Did you see Mr. Mylot and Mr. Befinger? A. We did.

Q. Where did you see them? A. At their head office in New York.

576 Q. In the Graybar Building? A. I believe that is where they are located.

Q. You had a conversation with Mr. Mylot and Mr. Befinger with reference to the sale of dairy products by the Bowman Company to the Great Atlantic and Pacific Tea Company in Chicago? A. I did.

Q. What was the conversation? A. We talked to Mr. Mylot first. He said that Mr. Befinger was out. I told him that I had handled that account personally since 1929 and I thought that we had given them good service. He listened and didn't make any comments. He said, "I would suggest you drop back tomorrow morning and see Mr. Befinger."

Q. Did you drop back the next morning? A. Yes, I did.

Q. Did you have a conversation with him with reference to the matter under discussion? A. Yes, we did.

Q. Will you tell the Court that conversation? A. Well, Mr. Befinger mentioned at that time he felt it was to their advantage to give the business to somebody else. I told Mr. Befinger, I said, "All I am interested in is holding our accounts." I said, "I am not down here to try to

577 get anybody else's business, but we have had that business and we are willing to meet any competition in order to hold our accounts."

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Q. Did you make inquiry as to what competitor was taking the business? A. Mr. Befinger wouldn't tell us.

Q. Did you ask him? A. Yes, I did.

Q. Did you ask him the terms or conditions that the competitor was giving the A&P? A. It is not the policy of the A&P to give out competitive prices. I asked them what we would have to do to hold our accounts.

Mr. Jinkinson: Your Honor, I move to strike the answer as not being responsive to the question. I don't know what he knows about the policy of the A&P. I don't know what he knows about the policy of the A&P.

The Court: It may be stricken.

Mr. Hart: I submit the latter part of the answer is responsive.

The Court: Strike the whole thing and let him go ahead.

(The last question was read.)

578 By the Witness:

A. Yes, I did.

Q. What did he tell you? A. He said, "What's your proposition?"

Q. He didn't tell you at any time the terms or conditions that the competitor was giving to A&P, the terms or conditions upon which they were selling milk to A&P in the midwestern division, that is, the Chicago area? A. I asked him, "Are you going to get 10½ per cent?" and his answer to me was, "What's your proposition?"

Q. So he didn't tell you then how much a competitor was paying A&P, is that right? A. No.

Q. By that you mean he did not tell you? A. No, he didn't tell me what they were getting.

Q. So you did not know precisely the terms or conditions upon which A&P was buying milk at that time? A. Well, I heard a lot of stories around the industry that someone had offered the A&P a 10½ per cent national discount.

Q. Did A&P tell you that? A. They said they were getting a far better proposition than what we were giving them.

579 Q. Did anyone connected with them? A. No.

Q. Did anyone connected with them? A. No.

Q. What was the remainder of the conversation you had with Mr. Befinger? I believe you told us that he

asked you what was your proposition. A. I believe at that time I made a proposition to Mr. Befinger of about seven or eight per cent. He came back with a remark, I think it was eight per cent, if I remember correctly— "It is still to our advantage to give our business to someone else."

Q. He didn't tell you that the amount of money that the other competitor was paying? All he said was it is to A&P's advantage? A. To the advantage of the A&P Company.

Q. Did he say it might have been to their advantage the quality of the milk was better or anything like that? A. Oh, no, he told me there was no complaint on the quality of Bowman's milk or no complaint on the service. The Chicago office had spoke very highly of our product.

Q. The complaint then was for what reason? A. They had a better proposition. It was to their advantage.

580 Q. However, he didn't tell you exactly or precisely what the proposition was and you never learned? A. Only what I heard around the industry somebody was in there offering them a national discount.

Q. What else was said at this meeting or conference you had with Mr. Befinger? A. I told Mr. Befinger that we were in a position to meet any competitive proposition.

Q. After you told him you would offer him eight per cent he said it was still to his advantage, and then what was said? A. And then I made him a proposition, I was pretty sure from the conversation that I had been hearing the last year that somebody had been in there and gave them a national discount of 10½ per cent.

Q. Giving them a national discount. I am talking about the Chicago area. A. Well, wouldn't the national discount cover the Chicago area?

Q. Who was it that was serving A&P on a national basis? A. That I couldn't answer. I know who was serving them here in Chicago.

581 Q. After making the offer of eight per cent, he said it was still to his advantage to deal with someone else. What happened then? A. I offered him a proposition of 11 per cent providing we could hold our business here in Chicago.

Q. The rumor you heard was that the competitor was paying A&P 10½? A. I knew we would have to meet it or better it in order to hold our business.

Q. Did you offer him 10½ per cent? A. No, I didn't.

Q. You went from eight to eleven? A. That is correct.

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Q. Which was a half per cent more than you heard, you heard rumor that it was being paid to A&P at that time? A. That is correct.

Q. Do you have any idea or recollection of the volume of the sales to the A&P stores for any one year while you were there at Bowman? A. I think shortly before I went down to New York I checked into it and if I remember correctly, I think the sales were around 200, 250,000 a year.

Q. Before you left—

Mr. Hart: Could we clear up that? Is that dollars
582 or bottles or what is it?

Mr. Jinkinson: That is dollars, I assume.

The Witness: Dollars, yes.

By Mr. Jinkinson:

Q. Before you left for New York why was there a director's meeting of the Bowman Dairy Company to discuss the loss of the A&P business? A. There wasn't a formal meeting. We got into a huddle.

Q. Who was in the huddle? A. I think Mr. Metzner, Sr. and Mr. Bremner.

Q. Are these men you are naming on the Board of Directors of Bowman? A. Yes. I think Cameron Peck.

Q. Was he also a director? A. Yes. Dr. Peck and myself.

Q. Where did this meeting take place? A. 140 West Ontario Street.

Q. Can you tell the discussion with reference to your going to New York and what offer you made? Tell the discussion. A. There wasn't a discussion at that meeting what offer I should make. We said that we couldn't sit down and let somebody take our business away from us without some effort to meet that competition. The
583 understanding was that I was to go back to New York and meet whatever competition was necessary in order to hold that volume of business.

Q. Was there any ceiling placed upon the amount of money you could spend to hold the business? A. No, sir.

Q. Incidentally, the sales figure you just gave me of approximately $250,000 a year, would that be before or after your five per cent discount to A&P? A. I don't remember. I know I got it roughly just what we were selling there, and what it would be to our volume if we lost it.

Q. When you left for New York you had a free hand in dealing with A&P in the matter of trying to get the A&P account back for Bowman, is that right? A. I wouldn't say I had a free hand.

Q. Did you have any restrictions placed on you? A. I had authority to meet whatever competition was necessary to hold our business.

584 Q. Did you have any authority to exceed what competitors were alleged to be giving A. & P.? A. I don't recall whether that was ever discussed. I do remember this discussion. I told them with the information that I had been hearing and the stories I have been getting around the street that I was pretty sure that they were getting 10½ percent on national discounts and we would have to meet that or go to 11 in order to hold our business.

Q. Where would you hear some of these stories from the street you were referring to? A. Oh, you would hear them at the national conventions and visiting different towns and the likes of that.

Q. Did you hear anybody on the street in Chicago discuss it with you? A. I believe that has been discussed.

Q. Who would discuss it? A. I can't remember all the conversation.

Q. Was anybody in the industry telling you that A. & P. was getting a 10½ percent discount, and can you name them? A. There were other men in the industry that

585 had some A. & P. stores and they lost them.

Q. Did anybody tell you that A. & P. was getting a 10½ percent discount from a competitor and who told you? Can you name the man who told you? A. Yes.

Q. Who? A. I will tell you. William Hunding. He went to New York to hold his business also.

Q. Was he a competing dairy man in Chicago? A. Yes.

Q. Did he go down with you? A. No, sir. He went down before I went down. He lost his stores before we did.

Q. Did you discuss with him the results of his trip to New York? A. The only discussion I had with him, he went down to New York and he held his stores.

Q. Did he tell you of his experiences in New York, of his conferences with A. & P.? A. No. He said he felt that somebody had been in there with a national discount of 10½ percent or better.

Q. He felt that. Did he tell you who it was? A. I don't remember whether he did or not.

586 Q. Did he tell you where he got his information? A. No, he didn't.

Q. Did you have any other information from anyone with reference to the alleged 10½ percent A. & P. was getting? A. No, I think that is all.

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Q. So on the information you secured from Mr. Hunding somebody told him that some national dairy chain was giving A. & P. 10½ percent, you ran to New York to try to make a deal with them, is that right? A. That rumor had been around the industry for the past year. I didn't run down there because Bill Hunding told me. That was a common gossip around the industry for the past year.

Q. Nobody from A. & P. told you exactly? A. They told me they were getting a better proposition.

Q. Now, getting back to the conference you had with Mr. Bofinger after you offered him 11 percent, what was said by Mr. Bofinger? A. He said, "What about the back discounts?"

Q. What back discount? A. He said, "We have been losing money dealing with you people for a long
587 time."

He said, "What about the difference between the 5 percent and the 11 percent?"

Q. Mr. Eggleston, I believe you testified that you have been handling the A. & P. business since 1929. A. That is correct.

Q. During that time you paid them 5 percent? A. That is correct.

Q. I asked you if you paid them anything else, and I believe you said no, is that true, any other discounts other than the 5 percent I asked you? A. Nothing that I can think of.

Q. Did you have any agreement or arrangement, understanding, written or oral, with A. & P. that you would pay them anything more than 5 percent between 1929 and the day in June in 1942 when you offered A. & P. 11 percent? Did you have any understanding with them? A. I can't remember.

Q. You say you can't remember. Was it possible that you had other agreements or understandings that you would give them rebates or discounts other than the 5 percent you testified to? A. No, I can't remember
588 of any such arrangement.

Q. So far as you know then the 5 percent you testified to is the only understanding or agreement that you had to pay them any money or discount or rebates? A. That is all I can remember.

Q. What was the money that Bofinger was talking about that you owed them?

I will withdraw that question. Strike that question.

Had you paid A. & P. all the money that was due them

under the arrangement to give them 5 percent? A. That is right.

Q. There was nothing due or owing A. & P. on the 5 percent at that time? A. No.

Q. What did he say with reference to other money or money he wanted from you other than the 11 percent you were now offering? A. As near as I can recollect he said they had been losing—that they had been losing money dealing with us for the past number of years and wanted to know what we were going to do about the past dis-

589 count between 5 and 11½ percent.

Q. What did you tell him? A. I offered him $50,000 in lieu of the past discounts.

Q. Were there any negotiations preceding your offer of $50,000? A. No.

Q. Did he indicate to you in any manner how much money he thought was due him? A. He indicated it was a large sum of money. I believe there was, if I remember correctly, and I think my first proposition—this happened way back in 1942—I think I made him a proposition of $25,000 and Mr. Bofinger said at that time that that wouldn't cover it and I raised it to $50,000.

Q. Wouldn't cover what? A. The difference in what they lost between 5 and 11 percent dealing with us in the past several years.

Q. What else was said with reference to the offer? A. That is about all that I can remember.

Q. Didn't you offer them $50,000? A.

590 I mentioned that.

Q. You said 25— A. I said the first offer was 25.

Q. He said it wasn't enough? A. He said that wouldn't cover it.

Q. You said, "I now offer you fifty," or what did you say? A. I said, "Well," I said, "suppose we make it $50,000, but that is absolutely as far as we can go."

591 Q. What did Mr. Bofinger say? A. Mr. Bofinger suggested that I go back to Chicago and call him, I think, on a Thursday.

Q. Call Mr. Bofinger, or someone out here? A. No, call Mr. Bofinger.

Q. Had you and Mr. Peck or anyone connected with Bowman been apprised prior to the meeting, the final meeting you had with Mr. Bofinger, that A & P was going to demand something beyond a larger and bigger discount?

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Mr. Hart: If the Court please, just for the sake of the record, that was Dr. Peck that he is testifying about.

Mr. Jinkinson: Dr. Peck. If I said Mr. Peck I meant Dr. Peck.

Mr. Ball: Will you read the question, please?

(The last question read by the Reporter.)

By the Witness:

A. No.

By Mr. Jinkinson:

Q. So that when you were where you now offered Mr. Bofinger 11 per cent, nothing had been said prior
592 to that time about paying any sum of money for what A. and P. considered to be money lost because you hadn't met this larger discount in the past? A. No.

Q. Nothing was said about it? A. No.

593 Q. Did you take it upon yourself as a director and sales manager of the Bowman Dairy Company to offer Mr. Bofinger the sum of $25,000? A. I think I told Mr. Bofinger at that time that our proposition was subject—that I would have to take it back up to our people; it would have to be subject to their approval.

Q. And you discussed it with Dr. Peck, if any such matter should come up, that you would have to make an offer of a lump sum payment? A. Yes, I believe in our negotiations, the doctor and I talked about it, and he remarked to me, "Well, we have got to remember that any proposition we made here, we have got to go back and talk to our people and get their approval of it."

Q. But had you talked to Dr. Peck concerning the possibility of any lump sum payment to A. & P.? A. No. It came as a surprise at that meeting.

Q. So that at that—

Mr. Hart: Wait.

Go ahead.

By Mr. Jinkinson:

Q. So you offered $25,000 and then $50,000, the
594 same to be approved by the board? A. He offered $25,000; he offered a payment.

Q. And then $50,000? A. And then I talked to Dr. Peck. I said, "Doctor—"

Q. Was Mr. Bofinger present? A. No.

Q. You stepped out of the room? A. We stepped out of the room and went into a corner.

I said, "Doctor, we have got to get this business or we lose $250,000 worth of business."

And I said, "I think we should be able to buy this in order to hold the business."

Q. What did Dr. Peck say? A. Dr. Peck said, "Well, remember, Eggleston," he says, "you have got to go back and get the approval of our people."

Q. So then you returned to the conversation with Mr. Bofinger and related the $50,000? A. Yes.

Q. Now, what else was said at the meeting after that?

A. That is about all I can remember.

595 He suggested that they go back to Chicago and call him on Thursday.

Q. And you did return to Chicago? A. That is right.

Q. You did call him on Thursday? A. I did.

Q. And what was the conversation at that time with Mr. Bofinger? A. I told him that we were willing to go through with our proposition that we made him, provided that we could hold our stores.

Q. What did he say? A. He suggested, he said, "Well, I would suggest that you call Mr. Hoadley and go over and talk to Mr. Hoadley.

Q. Did you go over to see Mr. Hoadley? A. I did.

Q. Did you go over to see him personally, or call him on the phone? A. I called him to make an appointment, and I went over to see him personally.

Q. Did you see Mr. Hoadley or Mr. Cannon, or both?

A. I saw Mr. Hoadley. I had no dealings with Mr.

596 Cannon regarding the discount.

Q. You had a conversation with Mr. Hoadley? A. Yes.

Q. What did he say? What did you say to him and what did he say to you at this conversation? A. He seemed to know all about the proposition, and he suggested we have the checks made out in three separate checks, and from then on I should deliver the discount checks to him personally.

We were paying a discount, I think, every quarter at that time.

Q. He wanted you to deliver the discounts every quarter? A. Yes.

Q. He wanted it in the form of a check? A. Yes.

Q. Or cash? A. No. It was a check.

Q. Payable to Mr. Hoadley personally? A. No. Payable to the A. & P.

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Q. Was this a change in the method of payment that had been made? A. No. We were paying every quarter.

597 But, as a rule, I would take the check in probably, and hand it to Cannon.

Q. What else was said at the conference? A. That is about all I can remember at this time.

Q. Mr. Eggleston, was the check to be a Bowman check or a cashier's check, which? A. That was never discussed.

Q. After the meeting did you make deliveries of the checks to Mr. Hoadley? A. Yes, I did.

Q. And what was the nature of the checks? What kind were they? Were they Bowman checks or cashier's checks?

Mr. Hart: I believe counsel has stipulated that the checks should be drawn on the Harris Trust Company, the checks involved, and I recall that they were cashier's checks from the Harris Trust.

Mr. Jinkinson: Your Honor, with respect to the $50,000, I asked him after the transaction was completed.

By Mr. Jinkinson:

Q. Did you later make a delivery of the checks? A. Oh, yes.

598 Q. Were they in the form of Bowman checks or cashier's checks? A. They were Bowman checks.

Q. I hand you document marked for purposes of identification Government's Exhibits 76, 77 and 78, and I ask you if you can identify those or state what they are. A. I believe that is. No. They are copies of the checks that I delivered to the A. & P. stores.

Q. Do you know what these are? A. Yes.

Q. You left them when you handed them to Mr. Hoadley? A. I left with what?

Q. You departed from them; they did not leave with you? A. I don't think so.

Q. These are photostatic copies? A. Yes, they are photostatic copies of the checks that I delivered to Mr. Hoadley.

Q. Did you make delivery at one time? A. I think Mr. Hoadley suggested that we split them up. I don't remember whether I delivered one at one time or two at one time.

599 Q. I hand you Government's Exhibits 76, 77 and 78, and I ask you to look at those. Do they refresh your memory? A. I know I made two calls over there.

I did not deliver the three checks at one time.

Q. The first check is dated July 7, 1942.

Now, do you remember whether you delivered this one the first day? A. I don't remember what checks were delivered. They were handed to me by Mr. Gullens.

Q. There is a check dated July 8, 1942, and July 9, 1942? A. Yes.

If I remember correctly, I delivered another check for $15,000.

Q. Yes. There are two for $15,000 and one for $20,000. A. I delivered the $20,000 at one time and the two for $15,000 at another time.

Q. Which did you deliver first, do you know? A. I can't remember at this time.

Q. To whom did you deliver them at the A. & P.? A. To Mr. Hoadley.

600 Q. Mr. Eggleston, in the course of those negotiations, after you returned from New York, and in the conversation with Mr. Bofinger between the time you returned at the time that you talked with Mr. Peck on the phone, did you ask anyone at the Bowman Dairy Company, anyone, to make any cost study with reference to any savings in the method and delivery over the method of sale of the Bowman Dairy Company products to The Great Atlantic and Pacific Tea Company? A. I don't recall making any cost study, but I know, by my experience as a division manager and as a sales supervisor, that it was far less expensive, and took less time to service one of the chain stores than it did an independent store.

The Court: We will recess until two o'clock this afternoon.

* * * * *

602 The Court: You may proceed.

H. C. Eggleston, a witness called on behalf of the Government, having been heretofore duly sworn, resumed the stand and testified further as follows:

Direct Examination by Mr. Jinkinson (Continued):

Q. Mr. Eggleston, prior to the time you were first apprised of A and P discontinuing the purchasing of milk from Bowman, did you have any information, rumor or anything else that they were about to do so? A. No. We had been losing a few of our stores prior to the time that we got a notice to discontinue all of them.

Q. But you had no independent information from anyone that A and P was to cut Bowman Dairy Company out completely, did you?

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Mr. Ball: May I have that question read?
The Court: Read it.

(The question was read by the Reporter.)

The Court: You may answer.

603 By the Witness:

A. No, I had no information except we were losing stores occasionally.

By Mr. Jinkinson:

Q. When I say information, I mean any rumor or authentic information, or anything else. A. I had nothing authentic. There was a lot of rumors to that effect.

Q. There were some rumors prior to the time you got back from your vacation? A. Yes.

Q. You had heard rumors that you were about to lose the A and P account? A. I heard rumors that they were considering taking all of their supplies from one dairy.

Q. Did they tell you from whom? A. Well, we lost some stores, and they were turned over to Borden, and I presume that it would be the Borden Company.

Q. I hand you Government's Exhibit 79, which has been marked for the purpose of identification, the same being one of the Sales Committee meetings, a minute thereof, that you have testified to heretofore.

I refer you to Page 3 in the 17th paragraph there-
604 of. The minute is dated March 11, 1942.

Mr. Hart: What paragraph?
Mr. Jinkinson: I think it is 11, Mr. Hart.
The Court: 17.
Mr. Jinkinson: 17 is right, Mr. Hart. At the top of the page.

By the Witness:

A. I believe I told the Committee that there was a rumor that we were to lose our A and P stores.

By Mr. Jinkinson:

Q. Where did you hear that rumor, do you know? A. I will tell you. I heard it in so many different places, it is hard for me to remember.

Q. You then had a discussion with the members of the Committee with reference to securing the names and addresses of all Borden independent stores? A. I believe I

told them at that time that if we have lost that business, if the Borden Company took the business away from us that we were going to go out and try to make it up on independent stores, yes. We were going to solicit their stores. That is the competitive situation in the market for a good many years.

605 Q. You hadn't been soliciting their independent stores prior to that time? A. If we got a store at our price, we took it.

Q. Then you had been soliciting their independent stores at all times, Borden's independent stores? A. If you know the caliber of the storekeeper, he won't change unless there is some inducement. If he could buy milk cheaper from us, he would buy it, but if he bought it from Borden for less, they would buy it.

Q. Were you actively soliciting independent store accounts of Borden's at all times? A. Whenever we could get an account at our price, we took it.

Q. And what would you consider your price? A. Our standard store price.

Q. And what was that? A. I can't remember what it was at that time.

Q. You mean the standard store price that you charged, then, for milk, is that what you mean? A. Milk and cream, and other products.

Q. Was there any other consideration to be given? A. No.

606 Q. So when you solicited a Borden independent store, there was nothing paid for the stop, or anything like that? You were merely soliciting the store on the basis you could sell dairy products cheaper to that store than Borden was selling, is that it? A. We could sell dairy products cheaper than Borden?

Q. To the independent store? A. The price of milk in this market was practically the same. The Union set the price for labor, and the Government set the price for the milk.

Q. So your milk prices were practically the same? A. The milk prices were practically the same, yes.

Q. What offer did you have, then, to the independent stores? A. We had no offer. We went out and solicited the business. We got it at our price, and took it at our price.

Q. And you were actively soliciting Borden independent stores? A. If we could get a store, we took it.

Q. Then you were soliciting it? A. At each store division, we had one or two men, and they were kept pretty

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busy on trying to hold our own business from these vendors going in and making inducements, and they were kept
607 pretty busy just holding our own accounts.

Q. Just holding your business? A. Yes, and if at any time they got a chance to take an account from anybody else at our price, they took it, but they were instructed not to go out and cut our price, to start any price war.

Q. Then the solicitors were actively soliciting Borden independent store accounts? A. I was not the Division Manager. I had no—they didn't report to me on what they did do.

Q. Did you make a list of the good prospects of the Borden independent stores, as you discussed in paragraph 17 of Exhibit 79? A. I think that we had the list of a good many of Borden stores, yes, and I believe they had a list of ours.

Q. Did you ever see that list completed? A. No, I never saw the list. I think that each Division Manager, they had a list of all of the stores in their Divisions, and who they were being served by.

Q. Did your solicitors call on Borden stores prior to the time a list was made, the list which was referred
608 to in Exhibit 79? A. That I don't know. The solicitors did not work under my supervision.

Q. Did you have a conversation with anyone at Borden telling them that you were going to solicit their business at any particular time after March 11, 1942? A. No, why should I tell them?

Q. Did you tell them you were compiling a list of their stores? A. I did not.

Q. Mr. Eggleston, was the Borden Company paying rebate checks to owners of locations where milk vending machines were placed?

Mr. Ball: Will you read that question, please?

The Court: Read the question.

(The question was read by the Reporter.)

By Mr. Jinkinson:

Q. Was the Bowman Company paying rebate checks to owners of locations where milk vending machines were placed?

The Court: In what period of time?

Mr. Jinkinson: Between 1940 and 1943.

609 The Court: Very well.

By the Witness:

A. I had never heard of any such occasion.

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By Mr. Jinkinson:

Q. Mr. Eggleston, I hand you a document marked Government's Exhibit No. 80, the same being one of the documents which you previously testified left the Bowman Company with you, one of the documents under stipulation.

It is a Sales Committee meeting of May 6, 1941. Does that show that you were present? A. Yes.

610 Q. I direct your attention to the last page, page 5, to the 27th paragraph of the exhibit. Will you read that, please? (Handing a document to the witness.) A. (The witness referred to a document.)

This is May 6, 1941.

Q. Have you read it? A. Yes.

Q. Now, does that refresh your memory any? A. No, it don't.

That is the first time that that has ever been called to my attention that anything like that existed.

Q. You don't recall Mr. Metzger attending the meeting and making such a statement or discussing that? A. Is Mr. Metzger marked on there as being in attendance at the meeting?

Q. Did everyone who attended at the meeting, was their name included as being present? A. Absolutely.

Q. Is it possible that they might be present at a meeting without their name being in the preamble of the docu-

611 ment? A. No, sir.

Q. This is another one of Mr. D. Cameron Peck's schemes to throw you off balance?

Mr. Hart: Object to that.

The Court: Sustained.

By Mr. Jinkinson:

Q. Mr. Metzger was manager of what division? A. The north division.

Whatever transpired between Mr. Buthman and Mr. Peck I don't know anything about.

Q. You are very positive that Mr. Metzger did not attend this meeting? A. I am positive that he was not present at any sales committee meeting.

Mr. Hart: I object to that.

The Court: Sustained.

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By Mr. Jinkinson:

Q. Do you have any explanation for that statement contained in the minutes? A. No, I have no explanation. I can't remember of any statement being made at the sales committee meeting.

Q. Mr. Eggleston, what was Lombard? What does
612 that mean? A. I think that was our Lombard division.

Q. Was that separate, or was it just a division? A. No. That was a division of the Bowman Dairy Company.

Q. Like Englewood division? A. That is correct.

Q. Where did the Lombard division operate? A. In Lombard, Illinois.

Q. That was in Cook County? A. I don't think it is. I think it is in Dupage County, isn't it?

Mr. Ball: Dupage.

Mr. Rothwell: It is in Cook.

The Witness: Is it?

The Court: Lombard is in Dupage County.

By Mr. Jinkinson:

Q. What is a real suburban chisler dairy? What would that be?

Mr. Ball: Objected to as calling for a matter lying outside of the scope of the issues of this complaint.

The Court: If it relates to the area in this complaint I—

Mr. Jinkinson: It does.

613 The Court: What does it relate to?

Mr. Jinkinson: It relates to the Lombard division.

The Court: Lombard is in Dupage County, and not within the complaint.

Mr. Jinkinson: It is not within the complaint?

The Court: I don't think that you allege Lombard in Dupage County.

Mr. Ball: The only thing that they allege out there is Oak Park, which is a village.

The Court: Oak Park is in Cook County.

The territory of the Chicago area, according to paragraph 11 of your complaint, means the territory lying wtihin the corporate limits of the Cities of Chicago and Evanston; the territory lying within the corporate limits of Wilmette, Kenilworth, Winnetka and Glencoe, all within the State of Illinois.

For the record, let it be noted that all the villages and the two cities mentioned are all in Cook County.

Lombard is in the County of Dupage, and we are
614 not concerned with it.

(A brief interruption.)

By Mr. Jinkinson:

Q. Mr. Eggleston, in 1941 did you have any suburban situation existing that needed attention or discussion with The Borden Company? A. I can't remember any.

Q. Do you recall ever having a telephone conversation with Mr. Baril concerning any suburban situation—

Mr. Ball: Objected to.

By Mr. Jinkinson:

Q. —in Cook County?

Mr. Ball: Objected to on the ground that Mr. Baril is now deceased.

The Court: Well, if no one else was present at the time of the conversation, the objection is well taken.

Mr. Ball: He stated that it was a telephone conversation.

The Court: The objection is overruled.

Mr. Jinkinson: Your Honor, that is the first time, I think, as I recall this is the first clear-cut explanation we
615 have had in reference to the dead man in here. That was the time we briefed the law, and I would like to be heard on it.

The Court: The ruling will stand.

Proceed.

By Mr. Jinkinson:

Q. Mr. Eggleston, if a competing wholesale vendor or a wholesale vendor of a competing dairy company desired to come over to Bowman, would you have any objection to the vendor so doing?

Mr. Hart: I object to this.

I don't know if Mr. Jinkinson is now offering this witness as an expert. He is putting hypothetical questions to him.

Mr. Ball: This question is objected to as speculative.

Mr. Jinkinson: It is on the policy of the Bowman Dairy Company.

The Court: Well, about the sales committee?

Mr. Jinkinson: Oh, yes, at that time.

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The Court: Very well. If you relate it to the policy of the company while he was sales manager under the
616 period concerned, you may answer.

By the Witness:

A. The union, the milk wagon drivers union would not allow us to put any vendors within the Bowman Dairy Company. That is why we had Ridgeview.

By Mr. Jinkinson:

Q. The union would not permit Bowman to take any? A. Absolutely no.

Q. Did you have any policy against Ridgeview taking any? A. Ridgeview was purely a vendor company.

Q. Would you have any policy which prohibited Ridgeview from taking the vendor from a competing dairy company, for example, Hawthorn-Mellody? A. I did not supervise the Ridgeview Dairy, and I never heard of any objection from them taking a vendor from anybody.

Q. Was the matter discussed at a meeting which you attended? A. I can't remember anything that was discussed.

Q. I hand you Government's Exhibit 81, which is one of the documents which you identified as being a
617 sales committee meeting, dated June 14, 1941, marked Government's Exhibit No. 81 for identification.

Is that Exhibit 81 for identification a meeting at which you were in attendance? A. That is correct.

Q. I direct your attention to the last paragraph on the second page—

Mr. Hart: Have you got a copy?
Mr. Long: No.
Mr. Ball: What was the date of that?
Mr. Jinkinson: June 11, 1941.
The Court: June 14, it says here.
Mr. Jinkinson: June 14, 1941, your Honor.
The Witness: June 14, 1941.
Mr. Jinkinson: June 14, 1941.

By the Witness:

A. I don't recall that being discussed.

618 Q. You don't recall who made it known to the committee? A. No, I don't remember that ever being discussed. I don't remember that ever being discussed.

Mr. Ball: What paragraph was that?
Mr. Jinkinson: Fifteen.

By Mr. Jinkinson:

Q. Do you know why the decision as to whether or not the vendor would be taken over by Bowman was held in abeyance? A. Taken over by Bowman? I just told you the union would not allow us to take over any vendor.

Q. Mr. Eggleston, you must remember, the minutes say Bowman here. Doesn't it say Bowman on Government Exhibit 81? A. That is probably why it was held in abeyance.

Q. Is that why it was? A. I imagine so.

Q. You remember now— A. No, I don't remember. But I know the union would not allow us to put on any vendors at any of the Bowman branches.

Q. That wouldn't permit it for Ridgeview? A. They permitted Ridgeview. It was an entirely different
619 company and their argument was if they allowed us to put vendors on at Ridgeview that would be changing our regular drivers over to vendors.

Q. Who suggested that the matter be held in abeyance? A. I don't know. I told you I can't remember that being discussed, but I know that the union wouldn't allow us to put on vendors at any of the Bowman Dairy Company divisions.

Q. Mr. Eggleston, in 1941, March of 1941, who was Mr. McVeigh working for, or what dairy company did he own? A. I can't remember who he was with at that time. McVeigh has been with three or four different dairies, one, then another, and then back again. I can't possibly remember the dates he made the changes.

Q. Do you recall a time when it was alleged that McVeigh was giving free cream on the market and the matter came up for discussion in the committee meeting on March 18, 1941? A. That might have been discussed.

Q. Did the committee agree that they would ask Mr. Kullman to talk to him? A. I don't remember of any such agreement.

Q. I hand you Government Exhibit 62 and ask you
620 to read paragraph 5 if that will refresh your memory.
A. I can't possibly remember that being discussed.

Q. You don't recall— A. That was in March of 1941.

Q. You don't recall whether or not Mr. Kullman was ever asked to see Mr. McVeigh? A. Not to my knowledge he wasn't.

Q. Did you ever subsequently hear any report from Mr. Kullman on that matter? A. No, sir.

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Q. What was meant by the statement, "The amount of free cream being given away." Was the free cream given or was it sold at a reduced price? A. I think in those cases it was given away free.

Q. Given to the public or to wholesale stops, which? A. There was some going on in the stores back when the storekeepers were given free cram or given cream for five or six cents. I can't remember just what it was. I know there was something going on.

Q. Is that the only time that particular condition existed on the market? A. That is the only time that I can remember and we tried to meet that competition and the union came in and called the strike and tied up our plant
621 until we discontinued it and in fact they called strikes on other dairies and compelled them to discontinue it.

Q. The dairy that Mr. McVeigh worked for at that time, was that a unionized dairy? A. It was, and the union went over and tied them up and stopped it.

Q. Giving away free cream? A. Yes, sir.

Q. Did you ask the union to do that? A. No, sir, I did not. They called a strike on our plant, too, with the Elston Store Division at the same time.

Q. Were you giving away cream at the same time? A. We went out to meet that competition, yes.

Q. You didn't start to give it away until after McVeigh started to give it away? A. McVeigh and some of the others. I think Blue Ribbon which was strictly a vendor company and Meadowmoor Dairies.

Q. Cream, I understand, was given to the stores, the wholesale stops, as a rebate or a gift or some inducement, is that right, or was it given to the public? A. No, it wasn't given to the store as an inducement. I think
622 the store was given so many bottles of cream, if I remember correctly, and he sold them at a cut price along with two quarts of milk.

Q. It wasn't given to the public, it was given to the stores, the wholesale stops? A. But the public got the benefit of it because they were able to buy it at a reduced rate.

Q. So the union cleaned up that particular situation and it wasn't necessary for you to talk to Mr. McVeigh or anyone else about it? A. Oh, no, they cleaned that up quick.

Q. But you saw a necessity at one time of having Mr. Kullman talk to Mr. McVeigh. A. I did not.

Mr. Hart: I object.

Mr. Jinkinson: It says so in the Committee meeting. I am trying to find out.

By Mr. Jinkinson:

Q. You were a member of the committee? A. I was a member of the committee, but I don't know what Cameron Peck put in those minutes.

Q. I see.

623 Mr Eggleston, did you ever attend a meeting of the sales committee where the possibility was discussed of buying up the milk supply of milk depots and removing them from competition, putting them out of business? A. I can't remember.

Q. Would you say it was possible you entered into such a discussion or attended a meeting along that line? A. I told you I can't remember of any such discussion or ever attending a meeting where there was any discussion. I don't know why—

Q. Was it something you wouldn't discuss at these meetings? A. I don't know why it would be discussed at the meeting, because the sale had nothing to do with the purchase of milk.

Q. But you did have something to do with competing against depots? You were in competition with the sale of milk in the Chicago market? A. We were trying to hold our accounts.

Q. You were competing, you were selling milk to the public and they were selling milk to the public? A. Yes.

624 Q. I hand you Government Exhibit 82, marked for the purpose of identification, a sales committee meeting of August 5, 1941. Does it show you were in attendance? A. Yes, I was at the meeting August 5, 1941.

The Court: What paragraph number?

Mr. Jinkinson: Paragraph 19 on the last page. This is one of the documents involved under the stipulation.

The Court: Very well.

By the Witness:

A. I can't remember that discussion, but I think Mr. Peck gave them an answer to it.

Mr. Ball: Object to questioning about this matter of the milk depots, because this is a retail business dealing with the retail competition and outside the scope of the issues of this complaint. I move to strike out the line of questioning relating to it.

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The Court: In any event the answer reveals the witness says he doesn't know anything about it, so it is immaterial.

625 By Mr. Jinkinson:

Q. Do you recall being present at this meeting? A. I can't remember.

Q. Do you recall the conversation about the topic, paragraph 19, which I have just showed you? A. No.

Mr. Ball: A further objection to this. It shows that this is dealing with milk that does not conform to Grade A requirements and therefore lies outside the scope of the complaint because milk sold within the area, the Chicago area, as defined in the complaint had under the regulations to be Grade A milk.

The Court: If there was anything in the record to strike, I would strike it, but there isn't.

Mr. Ball: I am not sure whether the pre-trial order states the scope of these milk market areas, but I believe your Honor is correct, it is not in the pre-trial order.

By Mr. Jinkinson:

Q. Mr. Eggleston, did you ever have a discussion
626 with anyone of Borden with reference to their paying a 10 per cent discount on delinquent collections?

Mr. Hart: On what collections?

Mr. Jinkinson: Delinquent collections.

Mr. Ball: Objected to unless the time is stated.

The Court: Yes. Do you refer to the same period, 1940 to 1943?

Mr. Jinkinson: Yes.

The Court: Very well, he may answer.

By the Witness:

A. I can't remember being present.

By Mr. Jinkinson:

Q. Were you ever present when that subject was discussed? A. I can't remember being present.

Q. I hand you a document marked Government Exhibit 83 for the purpose of identification as one of the documents which have been stipulated that was left with you when you left Bowman dated April 28, 1942. Does it show you were in attendance at the meeting? A. Yes.

627 Q. Directing your attention to paragraph 14 on page 2, does that refresh your memory? A. Paragraph 16?

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Q. Fourteen. A. I don't remember Mr. Peck's discussion.

Q. Do you recall the subject being discussed at the committee meeting? A. I can't remember such a discussion.

Q. You remember nothing about it whatsoever? A. No, sir.

Q. Mr. Eggleston, did you or anyone at Bowman have a discussion among milk dealers with reference to the raising of the half pints of school milk from four cents to five cents that you know of? A. I can't remember having any discussion.

Q. Do you remember any such discussion taking place at a sales committee meeting? A. I don't remember.

Q. I hand you a document marked Government's Exhibit 84 for the purpose of identification, which is one of the documents which is stipulated to—

Mr. Ball: Again, the dead air is making it difficult to hear counsel.

628 By Mr. Jinkinson:

Q. (Continuing) February 11, 1943, were you in attendance at that meeting? A. Yes, sir.

Q. Directing your attention to paragraph 12 on page 2, does that refresh your memory with reference to any discussion raising the price of milk from four to five cents for school purposes?

Mr. Hart: What is the paragraph number?

Mr. Jinkinson: Twelve.

By the Witness:

A. I can't remember that discussion.

629 By Mr. Jinkinson:

Q. You can't recall the dealers stated in the paragraph as agreeing to anything? A. No, sir.

Q. You can't recall who they were? A. No, sir, I can't even remember any discussion along that line. And that is strictly retail business that was mentioned in there. That is room to room service, which is retail.

Mr. Jinkinson: Your Honor, I want to make an offer of these documents, and I want to find out where we started.

The Court: All right, and I will rule on them after they finish cross examination.

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Mr. Jinkinson: All right, I will make the offer.

The Court: If you want to wait, you can do it.

Will your cross examination take up the rest of the afternoon session?

Mr. Ball: We are going to have some cross examination.

The Court: Then we will give you the evening to
630 assemble your exhibits, and you can offer them in the morning, if it will make it a little easier on you. If you want to, you may do that.

Mr. Jinkinson: It would be all right with me, your Honor. I can do that.

The Court: I am just trying to make it easier for you.

Mr. Jinkinson: There are some documents I have already offered.

The Court: Make a general offer. Go through your records over the evening recess, and then I will let you make a general offer of them in the morning, even though some of them have been previously offered.

Mr. Jinkinson: Yes.

The Court: Have you finished your direct examination?

Mr. Jinkinson: Yes. But I have a proffer to make.

The Court: As I stated in the pre-trial conference, you have leave to file an offer at any time, and then the
631 defense may file any objection they have to it tomorrow morning. Just file it with the Clerk.

Mr. Jinkinson: I have a written proffer and I will file it.

The Court: Very well. Give them a copy of it and they can file their observations with reference thereto tomorrow morning or sometime tomorrow, and I will rule on it.

Mr. Jinkinson: It is a written proffer.

The Court: All right.

Mr. Jinkinson: You may cross examine.

The Court: Proceed. Who is going to cross examine?

Mr. Ball: I am.

Mr. Jinkinson: Will it be necessary to mark the proffer for identification?

The Court: It will appear right in the file of the case. It doesn't need to have an identification mark.

Proceed with cross examination.

632 Cross Examination by Mr. Ball:

Q. Mr. Eggleston, you very regularly attended meetings with other milk dealers in the City of Chicago dealing with labor matters, did you not? A. I did.

Q. Do you recall how many of the milk dealers in the City were from time to time represented at those meet-

ings? A. Oh, I would say 80 to 90 per cent of the dealers in the area.

Q. The matter of commissions paid to your employees would be a subject of discussion at those meetings, would it not? A. It would be.

Q. The matter of the differences in rates to be charged, or commission rates to be paid to wholesale vendors as against wholesale route men as opposed to retail route men would be discussed? A. That was all negotiated in our labor contract.

Q. There was a difference, was there not, between the commissions paid to retail route men on their sales, and commissions paid to wholesale route men? A. Yes, sir.

633 Q. And there was a different discount arrangement with regard to bulk wholesale, was there not? A. There was a different commission?

Q. Yes. A. The bulk wholesale received no commission unless they were serving a school or a bottle stop, as near as I can recollect.

Q. So the bulk wholesale dealers received no commissions except in a few instances, whereas the store wholesale route men received a commission? A. That is correct.

Q. Now, was the commission paid to store route men more or less than the commission paid to retail route men? A. They were more. It was more. They had a sliding scale. I think at that time we were paying 60 cents a hundred, and the store routes at that time, I think they got up, after they sold a certain volume, we had to pay 90 cents a hundred.

Q. 90 cents a hundred. Now, the price charged a vendor by Bowman, if it had a vendor, or by another dairy, would be substantially lower than the wholesale price to stores, would it not? A. Oh, yes.

634 Q. What would be the control which Bowman, or any other dairy, would have over the prices charged by a vendor to his customers? A. We would have no control.

Q. What was the Union attitude toward the growth of the vendor system of distributing milk—

Mr. Jinkinson: I object.

By Mr. Ball:

Q. In the period of time, 1940 to 1943?

Mr. Jinkinson: I object, your Honor, to calling for the Union's attitude, to calling for an opinion and a conclusion.

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The Court: Sustained. He may state what the Union told him.

By Mr. Ball:

Q. Did you have any negotiations with the labor unions about the use of vendors? A. Yes, I did, on a great many occasions.

Q. Did you discuss with the Union the matter of adding vendors to the Bowman method of distributing? A. I did.

Q. Did the Union agree to permit the use of vendors?

Mr. Jinkinson: Objected to, your Honor, as not giving the time and place of the discussion, and no proper
635 foundation laid.

The Court: Sustained.

By Mr. Ball:

Q. Can you recall some of the specific discussions that you had on the subject during the period 1940 to 1943?

Mr. Jinkinson: I move that the witness answer Yes or No.

The Court: Yes. Can you recall any?

By the Witness:

A. Yes, I can.

By Mr. Ball:

Q. What was the first one in the period specified, that you can recall? A. Oh, I think it was back in 1940.

Q. And what was the discussion at that time?

Mr. Jinkinson: I object, your Honor, unless it is identified what part of 1940.

The Court: And who was present.

By Mr. Ball:

Q. Will you identify the part of the year, if you can, and who was present? A. I think I was present, and Mr. Hoban was present of the Milk Wagon Drivers' Union.

636 Q. Can you remember what month of the year this occurred? A. I think it was around the Spring of the year. I can't remember the exact month.

Mr. Jinkinson: I object to any interrogation of the witness as to the Spring of 1940.

Mr. Ball: The reason for discussing this subject is that it relates to the acquisition of the Ridgeview Dairy.

The Court: And in general I allowed during the direct examination of this witness that you include all of 1940, so I will make the same concession on cross examination. You may answer.

The Witness: What is the question?

The Court: Read the question.

(The record was read by the Reporter.)

Mr. Jinkinson: It was a move to strike. I move to strike the answer, your Honor.

The Court: There was no question. Very well, the answer may stand.

637 By Mr. Ball:

Q. Did Bowman in 1939 have, at the time that the Ratcliffe Brothers Dairy was acquired, have any vendors? A. No, sir, they did not.

Q. At that time were the vendors selling the milk of the Ratcliffe Brothers unionized? A. No, they were not.

Q. At that time, what is the fact as to whether the vendors generally in the City of Chicago were unionized? A. I don't believe there was any of them unionized at that time.

Q. What competitors of Bowman were the principal ones dealing through vendors at that time? A. Hawthorne-Mellody Farms had some vendors. Meadowmoor Dairy, Blue Valley Dairy, Lake Valley Dairy. Then there was Ridgeview and Belmont.

Q. In 1939, at the time of the acquisition of the Ratcliffe Brothers Dairy by Bowman, what type of customers were principally served by the various vendors then doing business in Chicago, whether store, wholesale, or retail business? A. The biggest part of them was store wholesale.

638 Q. At that time, did you in your negotiations have any discussions with the Unions with regard to the growth of store wholesale business as against retail business?

Mr. Jinkinson: Answer the question Yes or No. It calls for a Yes or No answer, your Honor.

By the Witness:

A. Yes.

By Mr. Ball:

Q. And what were those discussions?

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Mr. Jinkinson: I object, your Honor. No time and place fixed.

The Court: Yes, lay the foundation. When, where, and who was present?

By Mr. Ball:

Q. Can you tell who was present, and where the negotiations took place? A. Mr. Hoban was present and Mr. Ray Bryant of the Milk Wagon Drivers' Union was present.

Q. What time of the year did these meetings take place?

A. We had meetings quite often in regard to that vendor situation. I imagine that we were in a meeting around
639 every thirty days, or every sixty days, on the vendor situation.

Mr. Jinkinson: Your Honor, I move to strike what the witness imagines.

The Court: The answer may stand.

By Mr. Ball:

Q. Do you recall having such a discussion about the time that the Ratcliffe Brothers Dairy was acquired by Bowman? A. Yes, sir.

Mr. Jinkinson: I still object, your Honor. No proper foundation laid.

The Court: He is laying it now, I think. Wait until he finishes, then I will hear your objection.

By Mr. Ball:

Q. Now, were these drivers, at the time you acquired the Ratcliffe Brothers Dairy, were the drivers on company routes unionized? A. On Bowman's?

Q. On Bowman's. A. Yes, sir.

Q. At the time of the acquisition by Bowman of the Ratcliffe Brothers Dairy, did you ask the Union for
640 permission to add vendors to the Bowman system of distribution? A. I did.

Q. What was the Union's answer?

Mr. Jinkinson: Your Honor, I object as being too general.

The Court: Objection overruled. He may answer.

By the Witness:

A. They absolutely refused, and told me that if we attempted to put vendors in the Bowman divisions, that they would tie up the plant.

By Mr. Ball:

Q. At that time, did you discuss with the Union in the meeting you have described the question of reducing the rates on store wholesale business to permit the Bowman drivers to service economically the wholesale stops?

Mr. Jinkinson: Your Honor, I object as assuming a state of facts not disclosed by the record. I have as yet failed to understand where counsel has identified this meeting with these Union people. I don't know where the
641 meeting took place, or anything.

The Court: At about the time that Radcliffe was acquired. He mentioned Hoban and one other was present. He may answer.

The Witness: What was that question?

The Court: Read the question.

(The last recorded question was read by the Reporter.)

By the Witness:

A. I did.

Mr. Jinkinson: I still further object, your Honor.

The Court: I will hear you.

Mr. Jinkinson: I still further object because the question doesn't call for any identification of who told who. It merely asks Did the Union tell him.

The Court: Sustained.

Find out who he was conversing with, and who said it.

By Mr. Ball:

Q. Who were you conversing with at this meeting? A. Mr. Hoban and Mr. Ray Bryant.

642 Q. What did you say to these gentlemen? A. I told them on account of the vendor distribution in this market, and the wholesale business, it was impossible for us to compete with that type of competition unless we be allowed to put on vendors, or to reduce the store commission on the present Bowman routes.

Q. Now, who replied to you, and what did he say? A. Mr. Hoban said under no circumstances would they allow us to put vendors on Bowman routes, because if he did that we would use that as a method to turn over our present distribution to vendors, and he would not agree to allow any reduction on the wholesale commission.

Mr. Jinkinson: I move to strike that part of the answer which is speculative, that says he will do it if something happens.

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The Court: Motion denied.

By Mr. Ball:

Q. Did Mr. Hoban state at that time his reason for refusing to reduce the wholesale commission?

Mr. Jinkinson: Objection, your Honor.

The Court: On what ground?

643 Mr. Jinkinson: As calling for the man's reasons.

The Court: He is asking what he stated. Isn't that part of the conversation?

That is all right.

Mr. Jinkinson: He is calling for his reasons.

The Court: Proceed and answer.

By the Witness:

A. He said Bowman had signed a contract to pay that commission, and they were going to compel us to live up to the contract.

By Mr. Ball:

Q. At that time, on or about the day of the acquisition of the Ratcliffe Brothers Dairy Company, did you have any discussion with anybody in the Bowman Company with regard to the cost of the vendor distribution, of the vendor system of distribution, as opposed to the distribution through your own drivers? A. Yes, we had a general discussion there from time to time in our Directors' meeting. I recited the competitive situation, that it was impossible to compete with it. These vendors went out and bought their own truck. They had no insurance to pay.

644 The companies that operated vendors, they had no delivery expense to pay, and these vendors were out on the street selling milk at any price they could get.

There was no set price. With the vendors, the vendor could make a profit of one cent if he sold the milk. If he could make a three cent profit, he sold it.

645 Q. Did these conversations relate to the purchase of the Ratcliffe Bros. Dairy Company? A. That is correct.

Q. At the time of the discussion of the purchase of the Ratcliffe Bros. Dairy Company did you discuss with anybody in the Bowman Company the advantages or disadvantages of having two brands of milk?

Mr. Jinkinson: That calls for a yes or no.

By the Witness:

A. Yes, I believe I did.

By Mr. Ball:

Q. Will you state what you recall of such conversation?

Mr. Jinkinson: I object to that. No proper foundation has been laid.

The Court: Sustained.

By Mr. Ball:

Q. Do you recall with whom you had such a conversation? A. It was a general discussion with the directors, I believe, at that time.

Q. What did you say with respect to the matter of the two competing brands of milk?

646 Mr. Jinkinson: I object to that, no proper foundation having been laid.

The Court: Overruled. He may answer.

By the Witness:

A. Our laboratory showed that a good many of these vendors were putting out a milk with a test of 3.2, 3.21, and they were able to get by very well with this.

I think that the Health Department requirements required that milk sold in Chicago must test 3.14 and 3.25.

We were putting out a milk at that time with a test of 5.7 and 5.8.

It was impossible with this vendor distribution and the quality of milk that they were putting out to compete with their price.

Mr. Ball: Will you read that last answer, Mr. Reporter?

(Answer read.)

The Court: Very well.

By Mr. Ball:

Q. Was the figure, 5.7 that you were then selling and 5.8, or was it 3.7 and 3.8? A. 3.7 and 3.8.

647 Q. During the period of 1940 to 1943, when the retail routes were served, where you said that you did on occasion, did the route man receive a retail or a wholesale commission on the milk sold to the stores? A. I believe the commission at that time to a certain point was about 60¢.

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Mr. Jinkinson: I move to strike what the witness believes.

The Court: Very well.

By Mr. Ball:

Q. You stated that you were presently the owner of five shares of Bowman stock. Are you the beneficial owner of the stock? A. I am the beneficial owner. I did not purchase it. Mr. Adamson purchased the stock, five shares of stock, and put it in my name.

I told him that I didn't have the money to pay for it at any time that he wanted it. I asked him not to do it at the time, but he went ahead and did it.

I told him thata I didn't have the money to pay for it at the time and that I would be glad to turn it back at any time that he wanted.

648 Q. You have testified that you had a conference with Mr. Neafsey. Were you in the room when Mr. Neafsey testified here yesterday? A. Yes, I was.

Q. And have you anything to add to your report of the conference with Mr. Neafsey with respect to Government's Exhibit 47?

Mr. Ball: If I may have Government's Exhibit 47.

Mr. Jinkinson: Are you through with the question?

Mr. Ball: Yes.

Mr. Jinkinson: I move to strike the question on the ground that it is too general in nature.

The Court: Denied.

The Witness: What was the question?

Mr. Ball: Read it to him.

(Question read.)

By the Witness:

A. Yes. I have.

Mr. Jinkinson: That answers the question.

Mr. Ball: All right.

The Witness: I said, "Yes. I have."

649 By Mr. Ball:

Q. What further circumstances took place in that discussion? A. I got a call—I was out of town; when I got back into town, why, I got a call from the office that the FBI had been out looking for me.

And the next day I received a call from somebody at the FBI stating that they wanted to see me, and wanted to know if I could come down to their office.

I think I made an appointment with them for the following day; I believe it was on a Saturday I got in the office there.

Mr. Neafsey had a copy of the bids: Great Lakes, Fort Sheridan, the County Hospital.

I think he had Oak Forest there, and he had Hines, and he had Vaughn; he had a whole stack of them.

He asked me what I knew about these bids, and he had charts made.

"Look, Bowman got it at this much; Capitol got it at that much."

He said, "Do you mean that there wasn't collusion
650 on these bids?"

I told him that I had nothing to do with the handling of these bids.

I told him that Cameron Peck handled the bids at Great Lakes, and Mr. Phillipi handled the bids at the schools up until the time that he left and then they were turned over to Mr. Kettell.

And I at that time—that is all the conversation I had with Mr. Neafsey in that office.

A couple of days later, why, the girl rang my phone and says:

"Mr. Neafsey is out here, and he wants to talk to you."

He came to the office, oh, at least half a dozen times. He came out to my home, and the last visit he made at my home—

Mr. Jinkinson: Your Honor, I object to this long rambling dissertation, if it had nothing to do with the document.

The Witness: Oh, yes, it has a lot to do with it.

The Court: I will entertain a motion to strike if it does not.

651 By the Witness:

A. (Continuing) He came to my home several times in the evening, and he would ring the door bell, and I would find out and ask who it was.

He would say it was Mr. Neafsey.

The last call he made to my home he had, oh, I would say about eight or ten letters. They were all anonymous letters.

He asked me to read them. I read them.

He asked me if I know anything about them.

I told him, "No."

He said, "Did you write any of these letters?"

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The Court: What is it that you want to bring out?

Mr. Ball: I want to bring out the circumstances surrounding the signature of the affidavit, Government's Exhibit—

The Court: I have copies of it.

Mr. Jinkinson: Exhibit 45.

The Court: The objection is overruled.

654 By the Witness:

A. The Dr. Pepper Bottling Company of Chicago, we have an antitrust suit pending.

By Mr. Ball:

Q. Who is the attorney for the Dr. Pepper Bottling Company in that suit? A. Mr. McConnell.

Q. Is that the same Mr. McConnell who testified on the stand here Friday? A. That is correct.

Q. What were the circumstances surrounding the selection of Mr. McConnell as your counsel?

Mr. Jinkinson: That is objected to, your Honor, as being immaterial.

The Court: Oh yes, unless you show some reason, I will sustain the objection.

By Mr. Ball:

Q. Do you recall the date on which the suit was filed by Mr. McConnell on behalf of the Dr. Pepper Bottling Company? A. It was sometime in January, I believe, of 1951.

Mr. Ball: May I ask the Government if it is to be stipulated that that suit was filed January 25, 1951?

655 Mr. Jinkinson: I will stipulate with counsel if that is a fact. I will stipulate. But I have no knowledge. If you have checked it, and that is the fact, of course I will stipulate.

The Court: I am painfully aware that there is such a suit. I don't know of any suit pending in this court that has more controversy over pretrial discovery than that one. The date that it was filed, I have forgotten, but you will agree that the date that he says is correct?

Mr. Jinkinson: Yes, I will agree that that is the correct date. I will agree.

The Court: Very well.

656 By Mr. Ball:

Q. Handing you Government Exhibit 45, what have you to say in addition to your previous testimony as to the

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circumstances surrounding the preparation of that paper as far as you know? A. Well, Mr. Harsha from the Anti-Trust Division called at my office under the pretense that he was making a preliminary investigation—

Mr. Jinkinson: Your Honor—

The Court: That may be stricken. You may state what he said. I will draw the conclusions.

By the Witness:

A. Mr. McConnell told me that he was making an investigation of the Coca-Cola Company in regards to filing a complaint in Washington.

By Mr. Ball:

Q. Did Mr. McConnell make that statement to you? A. Mr. Harsha, and he asked me a lot of questions pertaining to Coca-Cola and asked me a lot of questions and told me there isn't any question of Coca-Cola violating the Anti-Trust law, but he said if we take action it is a long, drawn out affair, a lot of red tape, and it will probably take four years before it was brought to trial. He said, "I
657 would suggest that you bring civil action" and he said, "I think you can get relief pretty quick." I explained to him at that time that we were not in any position to finance a litigation of that kind. He asked me if I knew of a man by the name of Mr. McConnell. I told him I had heard of him, but I never met him. He said, "Mr. McConnell had been very successful in this type of litigation and I would suggest that you go up and see him." He said, "Lots of times these suits are won just by filing."

He gave me Mr. McConnell's telephone number and I called Mr. McConnell the next day and went up to see him.

Q. With respect to Government Exhibit 45, what discussions do you recall having with Mr. McConnell? A. Mr. McConnell told me that if I would help him with the Dean case that he would not settle the Dean case without settling our case along with it.

At the time I called on Mr. McConnell, I told Mr. McConnell what I knew of the Coca-Cola action. He said that there wasn't any question that "You have got a good case there and I am surprised that somebody hasn't brought action before this."

Mr. Jinkinson: I suppose, your Honor is going to
658 make the final decision as to whether or not Mr. McConnell has a good case in the Coca-Cola case.

The Court: In view of all of this discussion, I should divest myself of the case and send it to someone else which might not be a bad idea.

Go ahead.

By the Witness:

A. I told Mr. McConnell that we had no money to finance a suit of that kind and he said, "Well, I am not broke." He said, "I will go ahead and handle it."

We made an agreement with him to pay the cost and he would get 20 per cent of whatever was collected, if anything was collected.

By Mr. Ball:

Q. What discussions did you have, if any, with respect to Government's Exhibit 45? A. Well, this was made out by his private secretary and I can't recollect being sworn down there at all. I know while I was talking to Mr. McConnell he would call me and ask me to come in there and I was under the impression he'd want to talk about the Coca-Cola case. When I would get in there, all the
659 discussion would be pertaining to the Dean case.

Mr. Ball: May I have Government Exhibit 56? (Counsel handing document to Mr. Ball.)

By Mr. Ball:

Q. I hand you Government Exhibit 56 and ask you with whom you negotiated this contract? A. With Mr. Hart, Sr.

Mr. Ball: May I have Exhibit 40? (Counsel handing document to Mr. Ball.)

By Mr. Ball:

Q. I hand you Government Exhibit 40 and ask you with whom you negotiated that contract? A. Mr. Hart, Jr.

Q. What were the matters you discussed with Mr. Hart in connection with the negotiating of that contract? A. I told him that I knew I could go back in the milk business and I knew I could be successful in the milk business. I had been in it practically all my life and I told him that with my experience I wouldn't have any trouble getting connected. I asked him at that time if they cared to renew that contract or otherwise I was going back in the milk business.

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Q. Were any other matters discussed in connection
660 with the negotiating of that contract? A. I had lunch with Mr. Sam Dean on several occasions and he indicated he would be glad to have me come with him provided I wasn't under a contract with the Bowman Dairy Company.

Q. Did you report that conversation to Mr. Hart? A. I did.

Q. Now, at the time just before you went to New York to discuss the A & P matter, had the Bowman Company, or had it not, been losing store stops of the A & P to Borden's? A. That is correct.

Q. Had the loss of the A & P stores from Bowman to Borden been the subject of frequent discussions among the management of the Bowman Company? A. It had.

Q. You have testified as to a meeting or conversation between you and Mr. Baril and either Mr. Smaha or Mr. Koenig at the time immediately prior to the formation of Ridgeview. Do you recall where that conversation took place? A. I believe that was at one of our labor negotiations at the time we were in labor negotiations at the Associated Milk Dealers.

661 Q. Now, you have testified "that the understanding we had was that we would not use Ridgeview to go out and start a price war against the Borden Company and they said that if they went through with the proposition on Belmont that they would use that strictly to fight vendor competition and to meet the vendor competition."

In connection with that testimony what did you mean by the word "understanding"?

Mr. Jinkinson: Your Honor, we object to what the witness meant by understanding. He can tell what he did and what he said.

The Court: Overruled. He may answer.

By the Witness:

A. What was meant by that, that we would use Ridgeview simply to go out and meet the vendor competition, and I understood the Borden Company that if they started the Belmont, or took over the Belmont, that the Belmont would be used strictly to meet the vendor type of competition.

By Mr. Ball:

Q. You have reference to your understanding of their plans then? A. Yes.

662 Mr. Ball: That is all.

The Court: Have you finished your cross examination?

Mr. Ball: Just a moment, please. There are some documents here.

Could we have a stipulation that these three documents which are Defendants' Exhibits 1, 2 and 3 would be identified as other sales committee meetings by the witness?

Mr. Jinkinson: Yes. That is what you will mark 1, 2 and 3?

Mr. Ball: They will be the committee sales meetings of February 25, 1941; November 1, 1942; and November 17, 1942.

Mr. Jinkinson: And the agreement is that these are three more of the sales committee minutes which parted with this witness when he left Bowman.

Mr. Ball: Identified in the same circumstances as being of the same kind as the Government exhibits.

Mr. Jinkinson: Yes.

The Court: Very well, it is so stipulated.

663 Any other questions, Mr. Ball?

Mr. Ball: I have none.

The Court: Mr. Hart?

Mr. Hart: None, sir.

The Court: Mr. Tierney?

Mr. Tierney: No.

The Court: Redirect.

Mr. Tierney: Do those minutes have any numbers on them?

Mr. Ball: We are going to identify them as Defendants' exhibits. I wanted to make the stipulation at this time.

The Court: You may proceed with redirect.

Mr. Jinkinson: Are you through with those documents?

The Witness: Yes. May I get my last one back?

Mr. Jinkinson: Maybe we can make an agreement with the defendants that we can stipulate a photostatic copy of the witness' present contract with the Bowman Company in lieu of the original.

664 Mr. Ball: Most certainly.

Mr. Jinkinson: That will be Exhibit No. 40.

The Court: Very well.

Mr. Jinkinson: You may return the original to the witness.

The Court: Leave to make photostatic copy.

Mr. Hart: And the other original to me?

Mr. Jinkinson: If you want to do that.

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The Court: Very well, photostat both of them.

Redirect Examination by Mr. Jinkinson:

Q. Do you know whether or not Mr. McConnell is a member of any legal aid society furnishing free legal service? A. I haven't heard of any.

Q. You say that Mr. Harsha came to your office and discussed the Coca-Cola case with you, is that right? A. He did. He discussed it as late as last Wednesday, also.

Q. When was the first time he saw you at your
665 office? A. Shortly before this suit was filed. I think it was the first part of January.

Q. You mean your private suit? A. Yes.

Q. The first part of January, 1951? A. I believe it was, yes. About 30 days or three weeks before the suit was filed.

Q. Before the suit was filed. Was Mr. Harsha there for the purpose of interrogating you with reference to your connection with the Bowman Dairy Company? A. No. He talked at great length on the Coca-Cola Company.

Q. He said nothing to you with reference to your past connection with the Bowman Company? A. Towards the last I think he brought in a few questions. I don't recall just what they were at that time.

Q. Do you recall the answers you gave? A. I don't remember just what they were.

Q. You remember the conversation with reference to Coca-Cola and Dr. Pepper? A. Oh, yes.

Q. But you have no memory whatsoever with reference to what was said about milk? A. There wasn't a great deal discussed about milk.

666 Q. Whatever discussion was said, do you remember any of it? A. No, I don't.

Q. Had that been the first time that Mr. Harsha had approached you? A. I believe Harsha talked to me sometime along about the time the Robinson-Patman—or the trial was on before Judge Barnes.

Q. Had he spoken to you at any time while the criminal case, companion criminal case of this was under investigation by the Grand Jury? A. I believe he did.

Q. That was about 1948? A. 1948 or 1949, something like that.

Q. How many times have you seen Mr. Harsha in connection with this matter? A. Mr. Harsha had been out to the office three or four times and I think he had called me down there three or four times.

Q. Down there, you mean to the Anti-Trust Division office? A. Yes.

Q. Can you remember any date or any time that you attended any of these conversations with Mr. Harsha?
667 A. I can't remember the exact dates.

Q. Do you remember any conference with Mr. Harsha in the Anti-Trust Division office on May 4, 1951? A. I might have been there. I believe he called me in. He talked about this Coca-Cola case and he said he was referring it to Warsham.

Q. Did he show you any memorandum or document which he had written with reference to it? A. No, he did not.

Q. Did you tell him that you were looking for a lawyer to handle your claim against Coca-Cola? A. I did not.

Q. What did he say with reference to Mr. McConnell? A. He asked me if I knew Mr. McConnell. I told him that I had never met him. He asked me if I had met Mr. McConnell and I said no. He said, "Do you know him?" I said, "I have heard of him." He said, "He has been very successful in that type of litigation. I would suggest you go down to see him." I told him that we had no money to finance any litigation of that type.

Q. Who is "we"? A. The Dr. Pepper Bottling Company.

Q. How many bottling companies were you working for in Chicago after you left the Bowman Company?
668 A. I worked for the Mission Orange Company for a period of a few months while we were waiting to set up our franchise with the Dr. Pepper Bottling Company.

Q. Is Dr. Pepper now bottling Mission Orange? A. No.

Q. Did you have an interest in the Mission Orange Company? A. No.

Q. Do you know who owned it? A. It was owned by the Palmer estate.

Q. Do you remember any conversation you had at any time with Mr. Harsha with reference to milk, wholesale milk? A. He asked me a lot of questions about the bids and I gave him the same answer I gave you.

Q. Did he ask you any questions with reference to wholesale stop buying? A. Yes, he did.

Q. What did you tell him? A. I told him that we went out and met the competition at that time.

Q. Do you know the name of the stenographer in Mr. McConnell's office? A. Well, I understand that her
669 maiden name is either Sepan or Miss Koenig. Sometimes she goes by the name of Sepan and sometimes by the name of Koenig.

Q. Isn't it a fact her married name is Keppin? Her maiden name is Miss Koenig? A. That is right.

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Q. You state that Miss Keppin, Mr. McConnell's secretary, drafted Exhibit 45, is that right? A. Yes.

Q. Where did she get the material that she put in Government Exhibit 45, the facts? A. Mr. McConnell sat there with me and the majority of it was dictated by Mr. McConnell.

Q. Is it your testimony then that you and Mr. McConnell were in conference and that you were telling Mr. McConnell the facts contained in Government Exhibit 45 and he was dictating to Mrs. Keppin? A. The first or second time I went in there I talked to Mr. McConnell alone and he sat there taking everything down in long hand.

Q. Was anyone else with you when you were having this conversation with Mr. McConnell? A. I don't recall.

Q. Do you recall whether or not the door to Mr. McConnell's room was open or closed? A. I imagine
670 it was open. It was open in most cases.

Q. Do you know where Mrs. Keppin was stationed in Mr. McConnell's office? A. The first time I talked to Mr. McConnell?

Q. Yes. I mean, where her regular desk was, where she was assigned? A. She has a private office by Mr. McConnell's office.

Q. Adjoining Mr. McConnell's office? A. There is a door leading out of Mr. McConnell's office and then there is a door leading into her office, if I remember correctly.

Q. It is possible to hear where Mrs. Keppin is stationed; she can hear conversations going on in Mr. McConnell's office when the door is open, is that right?

Mr. Hart: I object.

By the Witness:

A. I wouldn't think so.

By Mr. Jinkinson:

Q. After you gave Mr. McConnell these facts the first time you were there, was anything done with reference to calling Mrs. Keppin in that day and dictating to her with reference to facts you had given him? A. No, I
671 think Mr. McConnell called me in again and he said, "I have taken this all down in long hand and I am going to repeat it." He called the secretary in; he is going to repeat it and she is going to write it up.

Q. Did you sit there and Mr. McConnell sit there, and he dictated it to his secretary, dictated these facts? A. That is correct.

Q. Did you hear them being dictated? A. I believe I did.

Q. Did you make any suggestion that these facts were not accurate? A. I think I mentioned to him that some of them I thought were a little exaggerated.

Q. For example, which ones? A. The statement in regards to the schools. I told him that that happened back before 1940. Mr. McConnell knew that.

Q. What else did you tell him was being exaggerated? A. That is the only thing that I said. I said that that was way back, that that happened way back before 1940.

Q. You admit that it happened, but you claim that it
672 happened before 1940? A. Absolutely.

Q. But there was nothing wrong with the facts as stated in Exhibit 40 with reference to its accuracy, was there? A. That is relative to the schools. I explained to Mr. McConnell at that time that the bids on the schools didn't mean an awful lot because regardless what bid we put in the schools that Warsham would call all the dealers down, if he had one company that put in a low bid on half pints of milk, he would ask the dealers whether you want to meet that, and we would have to meet the low bid regardless what we put in so the bids to the schools never meant a lot.

Q. Was there any importance attached to the year 1940 when you were talking to Mr. McConnell? A. Well, I know it was 1940, because Mr. Phillipi was handling the schools and he asked me to go along to one of the meetings.

Q. Mr. Phillipi left the company when? A. In 1941, the early part of 1941. I know it was at least a year and a half or two years before he left. I had nothing to do with the schools after that. He handled the schools up to his
673 death, and then Mr. Phillipi handled it or Mr. Kettel.

Q. Is there anything inaccurate in the last paragraph of the last page of Exhibit 45? What did you suggest to Mr. McConnell was inaccurate and should be changed?

Mr. Hart: Object to the form of the question. It is double barrelled, if the Court please.

The Court: Yes, separate it.

By Mr. Jinkinson:

Q. Is there anything inaccurate in the last paragraph of Government Exhibit 45? A. I told Mr. McConnell at that time just how the bids would happen, that we would put in the bids and the bids never meant a great deal because we would be called in by Mr. Warsham and asked to

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meet—we would be called in and asked to meet the lowest bid on every item that we bid on.

Mr. Jinkinson: I move to strike the answer as not being responsive to the question.

The Court: It may be stricken.

By Mr. Jinkinson:

Q. Is there anything inaccurate in the last paragraph of Government Exhibit 45? A. Yes, I would say—

674 Q. Now, is that the way you heard Mr. McConnell dictate it? A. I can't remember. I will tell you—

Q. Did you make a suggestion to him at that time that he was dictating something inaccurate? A. I told Mr. McConnell just how it happened, and I had to get back to my office. We were just a small organization, and that was handed to me, and I signed it, and that is all there was to it.

Q. I believe your testimony—I want to be thorough about this—I believe your testimony was, and if I am not correct, you can correct me—that you told Mr. McConnell the facts, and he then called in his secretary the next day, and you sat there while he dictated this affidavit.

Mr. Hart: I object to that question, if the Court please.

The Court: Overruled.

By the Witness:

A. Well, I tell you, he had me in there so often dictating to his secretary, I can't remember all of the facts that went on there, and I supposed everything was okey in it, and we are just a small organization, and he would

675 call me down there, and I would be down there for 3 or 4 hours, and he would give me this paper to sign it, and I would sign it and never read it, and I was very much surprised when I saw a copy of that affidavit in your office last Monday. You had a copy there, and I looked at it, and I was very much surprised. You remember that. The copy you had was not in my signature.

Q. What are the inaccuracies in the last paragraph of Government's Exhibit 45? A. Well, I wish to state that we never sat down with Borden on prices.

Q. Never? A. No. I went with Mr. Phillippi in one meeting, and we talked about the way Mr. Warsham was handling the bids.

Q. Now, Mr. McConnell drafted this affidavit, then, without your being there? A. I don't know.

Q. You just said a few minutes ago, if I had— A. He had Miss "Seapan" in there taking notes and writing up different things, and I surprised when I saw that affidavit over in your office, and I told you at that time that I couldn't ever remember signing anything like that.
676 You had a copy in your office a week ago Monday, and you had my signature signed on it, and I told you at that time that was not my signature.

Q. Mr. Eggleston, I hand you Government's Exhibit 45, and ask you if this is your signature? A. Yes, that is my signature.

Mr. Hart: If the Court please, we have been all over that, and he has identified that as his signature.

Mr. Jinkinson: I would be very happy to terminate this interrogation if the witness will tell me the facts in the matter instead of about three or four different conflicting stories.

The Court: Proceed with your question.

By Mr. Jinkinson:

Q. Mr. Eggleston, do you remember when you signed Government's Exhibit 45? A. No, I don't.

Q. Do you recall who was present when you signed it? A. No, I don't.

Q. Was Miss Koenig present? A. I don't recall.

Q. Do you know where you signed it, what place,
677 that is? A. If I signed it, it must have been in Mr. McConnell's office.

Q. And was anyone there that you can recall present when you signed Government's Exhibit No. 45? A. That is all I can remember.

Q. Do you recall whether anyone was there? A. Outside of Miss Koenig or Mr. McConnell, no.

Q. Well, who was present when you signed Government's Exhibit 45?

Mr. Hart: If the Cout please, this is highly repetitive.

The Court: He may answer.

By the Witness:

A. When I signed that, I was handed that, and I signed it, and I imagine Mr. McConnell or Miss Koenig was present.

Mr. Hart: I object to what the witness imagines and move that it be stricken from the record.

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The Court: It may be stricken.
Answer the question, if you can.

By the Witness:

A. (Continuing) Well, as near as I can recollect,
678 there were so many papers written up and handed to me to sign, and I signed them and never even read them.

By Mr. Jinkinson:

Q. Mr. Eggleston, do you know who handed you this document for your signature? A. I can't—I imagine it was Miss Koenig.

Q. Do you know in what manner it was handed to you? A. It was just handed to me and asked me to sign it, and I signed it, and I signed it, and I didn't read it; that is why I was surprised in your office when I saw it. I couldn't recollect ever signing anything like that.

Q. And as you walked in Mr. McConnell's office, or when you were there, Miss Koenig handed you Government's Exhibit 45, and you had it in your possession? A. When I signed it, I imagine I did.

Q. And you had an opportunity to read it? A. I probably did.

Q. And did you read it? A. I did not.

Q. Did you glance at it, or look at it? A. I didn't glance or look at it because I was so surprised when I saw it in your office, and I spoke to Mr. McConnell
679 about that, and I asked him when did I sign anything like that, and I said, "Well, I don't remember ever seeing anything like that."

Q. Now, do you deny now that this is your signature? A. No, I admit that that is my signature. When you are in litigation and are handed a lot of papers to sign, you don't know what they are.

Mr. Jinkinson: I move to strike the witness' voluntary statement from the record.

The Court: It may be stricken.

The Witness: The date on which that deposition—

The Court: There is no question.

By Mr. Jinkinson:

Q. Now, Mr. Eggleston, were you in Mr. McConnell's office on January 23, 1951? A. I believe I was in there. That was about the time we signed the complaint on our Coca-Cola suit.

Q. Now, were you also in Mr. McConnell's office on January 21, 1951? A. I probably was. It was just about the time we were preparing our Coca-Cola case.

Q. Now, are there any more inaccuracies in Government's Exhibit 45 that you called to the attention of Mr. McConnell as not being correct, other than what you claim to be the last paragraph—

680

Mr. Ball: Just a minute.

Mr. Hart: I suggest that the answer, if given to the witness, perhaps he could more intelligently—

Mr. Ball: I move to strike the question, because the question assumes that the witness has testified that he called to Mr. McConnell's attention inaccuracies, and there is nothing in the record so stated.

Mr. Jinkinson: I beg counsel's pardon, but the witness stated that he did call the inaccuracy to Mr. McConnell's attention.

The Court: My recollection in the testimony is that the witness stated that the last paragraph, the last statement is inaccurate, and does not conform to what he told Mr. McConnell at the time Mr. McConnell was making long hand notes, but I recall no testimony where the witness says that at the time he signed the document or any other time, that he specifically called Mr. McConnell's attention to any inaccuracies. He says he signed it with a group of other papers.

681

Objection sustained.

By Mr. Jinkinson:

Q. At the time you were present when Mr. McConnell was dictating Government's Exhibit 45 to his secretary, did you call Mr. McConnell's attention to any inaccuracy which he had stated or dictated other than that which you said you called his attention to concerning bids to schools?

Mr. Ball: The same objection.

The Court: The same ruling. You can strike that part of it out that is unanswered. He didn't state any inaccuracies were called to his attention.

Mr. Jinkinson: Well, I will strike the last part of the question.

By the Witness:

A. What is the question?

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The Court: At the time he was dictating this to his stenographer, did you call his attention to any inac-
682 curacies that you heard him dictate?

By the Witness:

A. At the time that he was dictating to his secretary he said he wanted to make notes of all of this story, and he did not indicate at any time that it was going to be an affidavit. He said it was information that he wanted to use in taking depositions.

The Court: Now, answer the question.
Did you call his attention to any inaccuracies at that time?

By the Witness:

A. Yes, I did.

The Court: While he was dictating?
The Witness: Yes, I did.

By Mr. Jinkinson:

Q. What did you call his attention to? A. I called his attention to the statement in there that we were meeting Borden on the bids, and I got the same answer, "Well we are just writing up this statement," he said, "to help us in our depositions."

Q. What depositions? A. The depositions he was planning on taking in the Dean case.

Q. Can you tell us, did he specify those depositions?
683 A. He said, "depositions."

Q. That is all he said? A. Yes.

Q. Now, you saw Mr. Neafsey of the Federal Bureau of Investigation on many occasions? A. On many occasions, yes.

Q. And did you see him so frequently that he became a bother to you? A. Well, I considered it, I considered being interrupted at your home all hours of the day or night—

Q. Did he treat you courteously on all occasions? A. I would say he was courteous.

Q. Reasonably courteous or courteous? A. Well, not any more than was necessary.

Q. Was he antagonistic towards you? A. He was very pesty, if you want to put it that way.

Q. Very what? I didn't get that. A. Pesty. He just pestered the life out of me.

Q. Now, when was the first time that you saw Mr. Neafsey? A. The first time I saw Mr. Neafsey was when I was called and asked to come down to the F. B. I.

Q. Was that on September 27, 1951, as he stated
684 yesterday? A. About that time, yes.

Q. Was anyone present on the occasion of the first meeting with Mr. Neafsey? A. There was somebody in his office there, yes.

Q. Who was it? A. I don't recall the man's name.

Q. Did you meet the gentleman? A. I believe I was introduced to him.

Q. And did he stay with you and Mr. Neafsey all through the interrogation by Mr. Neafsey, or the conference by Mr. Neafsey? A. He was in and out of the office.

Q. Did Mr. Neafsey stay with you at all times? A. Yes.

Q. And do you remember his name as being Raymond Carlson or Carlson? A. I don't remember what his name was.

Q. Did you ever see him after that? A. I cannot recall seeing him after that. Mr. Neafsey had a man with him, I know, at one time by the name of Peck.

Q. D. Cameron Peck? A. I don't think it was D. Cameron.

Mr. Jinkinson: Would the defendant be willing
685 to stipulate that it was not D. Cameron Peck?

Mr. Hart: I don't know.

The Court: Maybe the F. B. I. hired him.

By Mr. Jinkinson:

Q. Mr. Eggleston, were you given Government's Exhibit 47 and asked to read this before you were interrogated concerning it in any manner? A. I was handed a stack which he called "anonymous letters."

Q. A stack? A. Well, there were six or eight letters, let's say, in there. He asked me to read them. This was in my home.

Q. Oh, you didn't see Government's Exhibit 47 the first time you saw Mr. Neafsey? A. No, sir, I did not. This was one of the last interviews I had with Mr. Neafsey when he came to my home.

Q. When he came to your home? A. And my wife stood in the diningroom and heard the entire conversation.

686 Q. That was one of the last interviews in which he showed you Government's Exhibit 47? A. Yes, I would say it was one of the last interviews when he

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came to my home one evening, and my wife sat in the diningroom and heard the whole conversation.

687 Q. Did Mr. Neafsey show you any documents on the occasion of your first visit with him on September 25, 1951? A. He certainly did. He certainly did. He had a stack of bids there that high. (Indicating.)

Q. That was on the occasion of the first visit? A. Yes, and that is all we talked about, was the bids.

Q. Nothing was said concerning Government's Exhibit No. 47? A. No, sir, that was not mentioned. That was brought up the last interview I had with Mr. Neafsey when he came over to my house one evening.

Q. So you now deny that Mr. Neafsey showed you this letter on the first occasion, on the occasion of your first visit and asked you the question did you or did you not write Government's Exhibit No. 47? A. I did not see that letter on the first interview I had with Mr. Neafsey. I did not see that letter until Mr. Neafsey came over to my home one evening and my wife sat in the dining room and hear the whole conversation.

Q. Well, now, did you notice whether or not Mr. Neafsey was making any notes, pencilled notes when you were talking with him on the occasion of your first visit

688 on September 27, 1951, Mr. Eggleston? A. Mr. Neafsey, I can't recall of him making notes at any time that I talked to him.

689 Q. At any of the conversations that he had with you? A. No, unless he made notes on the bids that was discussed at our first interview that I had with Mr. Neafsey, which was in regard to bids, and he had a stack of bids there, about that high (indicating).

Q. Now, when you did see Mr. Neafsey, or when you claim he did see you and showed you Government's Exhibit No. 47 at your residence, what did he ask you with reference to Government's Exhibit No. 47? A. He handed me a stack, as he called them, of anonymous letters, and he asked me to read them, which I did.

He said, "Did you write any of those letters?"

Q. And what did you tell him? A. I told him, "No."

He said, "Do you know who did?"

I said, "No."

The Court: Do you have any more items on redirect? If not, we might as well conclude with this witness.

690 He has been with us since last Friday noon.

But if you have any more, I will adjourn; it is our adjournment hour.

Mr. Jinkinson: I have some more, I believe, your Honor.
The Court: About how long will you take?
Mr. Jinkinson: Well, probably ten or fifteen minutes.
The Court: Do you want to finish?
Mr. Jinkinson: I would just as soon finish in the morning.
The Court: Will you have any recross so far as you know?
Mr. Hart: Not unless something new is brought out.
The Court: Mr. Ball?
Mr. Ball: Not unless something further develops.
The Court: Well, then finish with him.

By Mr. Jinkinson:

Q. Mr. Eggleston, at the time that you made the agreement with the A. & P. to give them 11 percent, did you have any understanding with the A. & P. Tea Company or
691 anyone connected with Mr. Hoadley or anyone else that A. & P. would maintain out-of-store prices for the sale of Bowman milk? A. I did not have any understanding.

I think Mr. Bofinger mentioned that they would not reflect that in their selling price.

Mr. Ball: I move that the answer be stricken as not within the scope of the redirect examination.
Mr. Jinkinson: They asked him about the A. & P.
Mr. Ball: On recross?
The Court: Yes, you went into the A. & P. contract.
Mr. Ball: I asked him about losing those stores to Bowman, that is all.
Mr. Hart: Nothing about negotiations.
The Court: Well, the only reference was that this loss was before the negotiations with A. & P.
Mr. Hart: That is right.
The Court: That was before this. But what was gone into on cross examination, my notes indicate, that the
692 A. & P. discussion on cross examination concerned itself with the fact that before he negotiated with the A. & P. in New York, with the Bowman Company, that the Bowman Company had been losing several of the A. & P. stores to The Borden Company, and the details with reference thereto.

By Mr. Jinkinson:

Q. Mr. Eggleston, when you were with the Bowman Dairy Company did you know a vendor or vendors by the name of Satchell & Sons? A. I can't remember that name.

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Q. You don't know anyone by that name as a vendor or vendors in the milk business? A. No.

Q. You don't know whether or not they were vendors for the Bowman Dairy Company? A. In the Chicago area?

Q. In the Chicago area, right. A. I have never heard of anybody by that name.

Mr. Jinkinson: Your Honor, as long as I can't go into this—I am precluded from going into the A. & P.
693 testimony here, I have no further questions.

The Court: I think you went into it rather extensively on direct examination, and they did not cover it on cross, so I see no sense in going into it.

Is there anything else?

Mr. Jinkinson: No. That is all.

The Court: All right. You may step down.

(Witness excused.)

The Court: We will hear your reoffer of all of these exhibits that have been offered, if any have been, during this witness' testimony, and your offer of all of the others that have been identified, tomorrow morning, at which time I will also hear the defendants' objections with reference to them.

Mr. Ball: And the defendants' motions to strike the testimony of Mr. Neafsey, which we would like to make at that time.

The Court: Yes, I will hear that at the same time before you proceed with your first witness.

We will recess until 10:30 tomorrow morning.

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696 JOHN T. WALKER, a witness, called on behalf of the Government, having been first duly sworn, was examined and testified as follows:

Direct Examination by Mr. Rothwell:

Q. Will you please state your name, sir? A. John T. Walker.

The Court: Will you spell your last name, please?

By Mr. Rothwell:

Q. Will you spell your name, please? A. John T. Walker.

The Court: W-a-l-k-e-r?

The Witness: Yes, sir.

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place on its use here, I think the general rule is that
699 any prior statement at any time may be used for im-
peachment purposes, and that applies to Grand Jury transcripts also, provided you are not in trouble with the Judge in charge of the Grand Jury. That is a matter for him.

However, that portion of the transcript, namely, the testimony of the witness whom you now sought to impeach, must be shown to opposing counsel for purpose of cross examination, not the entire transcript of the Grand Jury proceedings, but that part of it that relates to his testimony must be made available not only to the Court but to opposing counsel.

I will accept your representation as to the date of the Grand Jury hearing, and that it is an accurate transcript.

Mr. Jinkinson: Of course, with Socony Vacuum, the Government used the Grand Jury transcript in this manner. It was shown to the Court, and the Court looked at it. It was not shown to the witness. Government counsel merely
read the transcript and asked, "Did you ask this ques-
700 tion and did you give this answer."

The Court: That is the proper way.

Mr. Jinkinson: But it was not shown to opposing counsel, and the Supreme Court has held it did not have to be shown to opposing counsel.

The Court: Well, I know that that portion of it relating to this witness must be shown to opposing counsel for their use in cross examination.

The Witness: Your Honor, could I ask a question?

The Court: I think not at this time.

The Witness: There is something in my mind I would like to get you to answer for me.

The Court: What is it?

The Witness: When I came here Friday, when I got my subpoena and I was taken down to the 4th floor, and I was given this, which this Mr. Jenkins referred to now as my Grand Jury testimony—

The Court: Yes.

The Witness: I stated, when Mr. Rothwell gave
701 me that, I says, "This is not my Grand Jury testi-
mony."

Mr. Rothwell says, "Well, somebody must have perjured themselves."

I says, "Well, I don't know who it was, but it was not me."

Well, he gave it to me, and he said it was my Grand Jury testimony. Well, I didn't do any more about it then, but it

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bothered me, and he gave it to me to read, and he says, "Now, I don't want you to read anybody else's testimony but your own, because it is a Federal offense if you do."

Now, I went home on Friday night, and I was shaving in my bathroom, and I come downstairs, and I says to my wife, I says, "That is not my testimony. I know it is not my testimony." I was on the stand at the Grand Jury less than ten minutes. I was asked nothing pertaining to the Belmont Dairy. I was asked questions pertaining to Mr.
Magorien, who has now passed on, and the questions
702 that was asked me, I could give no answer to them, because I knew nothing about them. I was only a foreman.

They wanted to know if Mr. Magorien give Mr. Stevenson directions, or orders, and what Mr. Stevenson had told me.

And I said they never done so at any time. Now, I come back on Monday, and I am taken down again to the 4th floor. I protested to Mr. Rothwell. I said I didn't think it was fair that I was subpoenaed, and I thought that I was to come as a witness, and I am going to tell the truth. I stated to him then, "You were the gentleman that made me a citizen. I took my oath in front of you. And I was going to be a citizen that was never going to bring disgrace on the United States of America, and that I was going to tell the truth regardless of what was said, and why don't you put me on the stand and let me do that"?

All right, it was an offense on Friday to read
703 somebody else's testimony. This is what I want you to clear in my mind, because I don't want to do anything on here that is wrong. And if it was an offense for me to read somebody else's Grand Jury testimony on Friday, why was Mr. Pergler's testimony given to me on Monday, and I was allowed to read part of it. That was not fair towards me. If it was a Federal offense on Friday, why wasn't it a Federal offense on Monday, when Mr. Rothwell gave it to me to read, and they had me down there, I would say, more than one day. I was supposed to come on the stand Friday. I was called down there, and Mr. Rothwell says I was not ready to go on the stand. I am always ready to go on the stand and tell the truth. I just want these things cleared, your Honor.

Mr. Jinkinson: May I say a word in behalf of the Government, your Honor?

The Court: Yes.

Mr. Jinkinson: The government is getting a little bit

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irked with witnesses coming here and attacking coun-
704 sel for the Government. I think the Government has a right to interrogate a witness before they put him on the stand. I think the Government ought to refresh their memory. I think the Government can give him something to read to refresh his memory.

The Court: There is no question about that, as to the order in which the Government puts on witnesses.

As to the improper use of Grand Jury testimony, that is another matter, but it is not a matter before me, so I don't intend to get into it.

So far as the Government interrogating witnesses before they put them on the stand, or the order in which they put them on the stand, that is the Government's prerogative, and you don't have to argue that with me.

But in view of this question as to what testimony he did give before the Grand Jury, I certainly will want
705 to see the Grand Jury minutes before you use them.

Mr. Jinkinson: I just asked Mr. Rothwell, and he said he did not show the witness the testimony of anyone else.

The Court: I am not going to get into this issue. We will proceed, and I am not going to be concerned with that. The witness is here now, and he is testifying with reference to the charges in this case, and I will hear what he has to say in that regard.

Mr. Jinkinson: Very well.

The Court: If you want to use the Grand Jury minutes, I want to see them first.

Mr. Jinkinson: Very well, we will show them to you.

Mr. Ball: Defendants object to any attempt to impeach this witness, as there has been no foundation laid for the Government to impeach their own witness.

706 The Court: I don't know, until I hear what the Grand Jury testimony was. Then you will have to lay a foundation before they use it, of course.

Mr. Jinkinson: The last question and answer on Page 9235. It is open there, your Honor.

The Court: On what day did you appear before the Grand Jury, Mr. Walker, do you remember?

The Witness: I couldn't remember, your Honor.

The Court: Do you know what day of the week it was?

The Witness: No, sir.

The Court: Yes. If you lay a proper foundation, I will let you use this deposition insofar as the last question and answer on Page 9335 is concerned, and the subsequent one on Page 9236.

However, I think we already have the testimony as to what this term means. In fact, wasn't there a stipulation on what "farm-out" meant?

707 Mr. Rothwell: No, your Honor.

Mr. Hart: If there hasn't been, I think we would be happy to stipulate.

The Court: I know it was defined by several previous witnesses.

Mr. Hart: I can't speak on behalf of the others.

Mr. Ball: Defendant objects to any attempt to impeach this witness on an immaterial point.

The Court: The most it will be is cumulative. You want him to say what farming out is, and it is the same as apparently that witness said at the Grand Jury hearing, which is the same as I have heard from many other witnesses thus far. What is the materiality of it?

708 Mr. Rothwell: It seemed to me the record was not clear when he spoke about his farm out. He compressed it into one phrase, and then wouldn't say whether it was three parties or not.

The Court: I have had that defined by two or three other witnesses. What is the materiality of going into it again? And it was defined the same way as that grand jury transcript indicates, so if you want to read that, go ahead and do so. Lay your foundation and do it. I don't think it is very material.

The rest of his testimony, I might say from my cursory examination of the transcript is just the same as he has given here on other points. I have cursorily examined the transcript here, but his testimony prior to that point seems to be about the same.

Mr. Rothwell: All right.

By Mr. Rothwell:

Q. Mr. Walker, did you appear before a Federal

709 Grand Jury? A. Yes, sir.

Q. On July 21st, 1948? A. I couldn't tell you when, the year or the date, no. I know I was there.

Q. Were you sworn in before that jury, sir? A. Yes, sir.

Q. During the course of your examination, were you asked this question, and did you give this answer:

"Q. Mr. Walker, can you tell us whether or not you have ever heard the expression of farming out a stop? A. Yes, sir."

A. Again I say—

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Q. No, just answer the question. A. I say that I can't recollect even being asked these questions before the grand jury.

Mr. Rothwell: All right. You don't remember. Very well.

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TESTIMONY OF HANS MOSER

Q. What conversation did you have, if any, with respect to this Navy Pier business which you were supplying? A. I had a conversation. Mr. Baril called me up one day—

Mr. Ball: Object to any discussion or conversation with Mr. Baril as a party now dead.

By Mr. Long:

Q. Was anyone else present at this conversation? A. No.

Q. Just you and Mr. Baril? A. That is right.

The Court: Objection sustained.

Mr. Jinkinson: The Government would like to make a proffer here in order to save time.

The Court: Yes, let it be filed with the Clerk.

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Q. Did you have any subsequent conversation with Mr. Baril about your priority?

Mr. Ball: Object to that.

The Court: He may ask if he had a conversation or not. Yes or no?

By the Witness:

A. Well, yes, we had a conversation. We had luncheon, we had a conversation.

By Mr. Long:

Q. Where was this? A. It was in my car.

Q. When was it? A. It was in 1943 when we got our contract.

Q. What was said at this conversation?

715 The Court: Is this the one with Mr. Baril?

The Witness: That is right.

Mr. Ball: Object to that.
The Court: Sustained.
Mr. Long: If the Court please, I think they opened it up by asking about the priority.
The Court: No, I have sustained the objection.
Mr. Long: Very well.
That is all.

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716A TESTIMONY OF PATRICK J. CUNNINGHAM

Direct Examination by Mr. Kerr:

Q. Will you please state your name? A. Patrick J. Cunningham.
Q. Where do you live, Mr. Cunningham? A. 8009 South Elizabeth Street.
Q. What is your business? A. I am in the milk business, President of the Cunningham Farms Dairy.
Q. What is your address? A. 7630 South Racine Avenue.
Q. How many routes does Cunningham Farms Dairy have? A. At the present time?
Q. Yes, sir. A. Eleven.
Q. Are some of them retail routes? A. Yes.
Q. Do others serve institutions? A. Yes, sir.
Q. And wholesale stops? A. Yes, sir.

* * * * *

716B Q. Mr. Cunningham, has the Cunningham Farms from time to time placed bids for the public school penny milk program? A. Yes, sir.
Q. Briefly, what is the procedure which you as a dairy must go through in order to place a bid for that business? A. They mail a bid out to you, and then you bring it in at a specified time on a certain day.
Q. Are these bids there opened publicly? A. Yes, sir.
Q. Are they inserted in any place publicly? A. In a box.
Q. Can you be observed placing a bid? A. Yes, sir.
Q. Do they also have a meeting right afterwards so that you can hear the bids? A. They open the bids during the meeting; in fact, that is why they call the meeting, to open the bids publicly.

716C Q. On the same day? A. Yes, sir.
Q. Do you remember when you started bidding on the public school penny milk program? A. I believe it was 1943, 1944, something like that.
Q. Have you continued to bid on that since? A. Yes.
Q. How often are the bids taken for that milk? A. Yearly.

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Q. About what time of the year? A. December.

Q. Do you recall a meeting which was called by the officials of the Board of Education concerning this program during the war years? A. Yes, sir.

Q. Can you place about when the meeting took place? A. 1945 or 1946, something in there, I think. During the war.

Q. Did this meeting concern the taking over of this program by the local Board from the government agency, the national government agency? A. Yes. Up to this time the government handled the penny milk program in the schools.

716D Then it was turned over to the Board of Education and that was the reason for the calling of the meeting in Mr. Warsham's office.

Q. This meeting took place right at that time? A. Yes, sir.

Q. I think we can place the date from that. What dairies were represented at this meeting?

* * * * *

By the Witness:

A. Borden, Bowman, myself, Weiland, Capitol. There was probably ten dairies in all, or twelve represented. There were quite a few there.

By Mr. Kerr:

Q. Do you know Mr. Eggleston? A. I know of him, yes.

Q. Do you know him if you see him? A. I haven't seen him in years.

Q. Did you know him then? A. Yes.

Q. Was Mr. Eggleston at the meeting? A. Yes, sir.

Q. Are you sure? A. Yes, sir.

716E Q. Whom did he represent? A. Bowman.

Q. What took place at the meeting? A. Well, Warsham, Frank Warsham, said he was going to put in penny milk programs in the schools and Mr. Eggleston stood up and said that Bowman didn't want it and Borden did likewise.

Q. Did someone from Borden stand up after Mr. Eggleston spoke? A. I think his name was Barnett, if I am not mistaken.

Mr. Hart: What was the name?

The Witness: Jack Barnett, wasn't it?

Mr. Ball: From Borden?

The Witness: Or Baril, one of them; I don't know, but it was somebody representing Borden. They said they

didn't want it, and the rest of them agreed with them and I said I would take all I could handle.

By Mr. Kerr:

Q. Did you then speak at the meeting? A. Yes, sir.

Q. What else was said there? A. I said the day would come when they would be glad to get them. I said I would handle all I could and Mr. Eggleston said, "Why didn't you give them all to Cunningham," knowing I couldn't handle it.

Mr. Ball: Just a moment. Move to strike out what Mr. Eggleston knew.

The Court: He may state what he said. I think that is all he did. It may stand.

By Mr. Kerr:

Q. Was anything else said at the meeting? A. No.

716F Q. Did Mr. Warsham say anything? A. He said he was going to put it in and we were going to accept it, we were the leading dairies, if we didn't accept them, he would get other people to serve him.

Q. Did you then bid each year in December for this business? A. Yes, sir.

Q. Before your bid each year did you receive a phone call from a person or persons from any other dairy? A. Yes, sir.

Q. Did this happen each year? A. Yes, sir.

716G Q. Who called you and what did he say?

The Court: And in which year.

By Mr. Kerr:

Q. Can you remember specifically one of these conversations and relate from memory just for one of them? A. Well, Kettel called me and so did a fellow by the name of Scholl.

The Court: What year?

By Mr. Kerr:

Q. Can you say what year or before one of these bids, say, your first or second? A. It would be 1940—it would be after my first bid, second or third time, I imagine, that I bid in there.

Q. Did this phone call take place a few days after one of your bids or a few days before the next bid? A. Before I bid.

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Q. Did you receive such a phone call a few days before your second bid on the penny milk program? A. Yes.

Q. Who called you? A. Mr. Kettel.

Q. Who was Mr. Kettel? A. He represented the Bowman Dairy.

Q. What did he say? A. He gave me the prices that he was putting in and told me those were his prices and asked me if I would put in the same.

Q. Did he say anything else? A. That is all I remember.

Q. Did he give you these prices in numbers? A. He gave them to me the way they were priced.

716H Q. The actual figures? A. Yes.

Q. Cents? A. Like 14¼ on a quart of milk or 4½ on a half pint of white milk.

Q. He gave you Bowman's precise bid? A. Yes, sir.

Q. And was this before the bids were opened? A. Yes, sir.

716I

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Q. Were these bids unsealed or available to the newspapers or to the public or to other bidders before that time? A. No.

Q. Mr. Kettel's phone call, however, was a couple of days at least before the bid opened? A. Before, yes.

* * * * *

By Mr. Kerr:

Q. Have you related everything that Mr. Kettel said on the phone? A. Yes, that he would like to have me put in the same prices that he did.

Q. What did you say? A. I said I would.

716J Q. Did Mr. Kettel call you again? A. Yes, he did.

Q. Did he call you in the following December? A. Yes.

Q. What did he say on that occasion? A. Practically the same story, just give me the prices and "this is what we are putting in, will you put in the same prices."

Q. Has any other dairy or dairy official made a phone call to you about the public school penny milk program? A. Bill Scholl.

Q. Who is he? A. He owned the Scholl Dairy.

Q. Do you remember which time he called you? A. No, I don't remember the particular time.

716K Q. Was it one of the years after these occasions that you have described that Mr. Kettel called you? A. Yes, sir.

Q. Was it in about the first four years that you bid on this program? A. I presume that is true.

By Mr. Kerr:

Q. Do you know Mr. Scholl? A. Yes.
Q. Do you know his voice? A. Yes.
Q. What did he say on the 'phone when he called you?

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A. He said he had Bowman's prices, and his own, and he gave them to me over the 'phone, and asked me to go along like the other time.

716L

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By Mr. Hart:

Q. Now, on this school business, after Mr. Warsham had charge of it. Wasn't it his habit after the bids had been opened, to call in the dealers and get them
716M to all meet the lowest bid on schools that they could take care of? A. Yes, sir.

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716N DEPOSITION OF CHARLES C. HEINZ

Mr. Jinkinson: You Honor, we have the sealed deposition of Charles C. Heinz, which we would like to offer at this time.

The Court: Very well. Do you want it opened?

Mr. Jinkinson: Yes, sir.

The Court: The Clerk will open the sealed deposition. What is his full name?

Mr. Jinkinson: Charles C. Heinz.

The Court: Do you want to read it?

Mr. Jinkinson: What is the modus operandi in this?

The Court: Are there objections in it?

Mr. Jinkinson: Yes, there are. There are many objections.

The Court: Then I think what we had better do is read it. Start at the beginning and go through it. The easiest way, I think, if you have an extra copy, is to have one man read the question and another read the answer.

I will follow you on the original, and rule on the objections.

716O "CHARLES C. HEINZ, having been first duly sworn, deposeth and saith as follows:

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Direct Examination:

(Thereupon, Mr. Kerr read the questions and Mr. E. C. Heininger read the answers as given in the deposition of Mr. Heinz.)

"By Mr. McCareins:

Q. Will you state your name, please? A. Charles C. Heinz, H-e-i-n-z.

Q. Where do you live, Mr. Heinz? A. Bakers Field, California.

Q. You formerly lived in Chicago? A. Yes, sir.

Q. When did you leave Chicago? A. I believe it was in '47, somewhere in the summer of '47.

Q. You were at one time employed by the Bowman Dairy Company? A. Yes sir.

Q. And during what period of time? A. I believe it was about 1924 to 1945.

Q. And thereafter you were employed by Hawthorne Mellody? A. Correct, sir.

Q. During what period of time? A. Immediately after I left Bowman.

Q. And for how long? A. One year.

* * * * *

"Q. What was your position when you started with the Bowman Dairy Company? A. Route salesman.

716P Q. And how long were you route salesman? A. Approximately three years.

Q. That would be from 1924 or 1925 to 1927? A. Approximately, yes.

Q. And then what position did you take? A. Assistant Foreman. That was for one year.

Q. With what division of Bowman? A. Irving Park Division.

Q. And how long were you Assistant Foreman at the Irving Park Division? A. One year.

Q. And then what position did you hold? A. Foreman.

Q. Where was that? A. At the Irving Park Division.

Q. How long were you Foreman? A. About a year.

Q. And then what position did you hold? A. Assistant Manager.

Q. Where? A. At the Irving Park Division.

Q. During what period of time? A. Up to 1936.

Q. Is that a period of about eight years as Assistant Manager of the Irving Park Division? A. About.

Q. And then what position did you hold? A. I was transferred then to the Evanston Branch as Manager.

Q. And how long were you Manager of the Evanston Branch? A. Ten years.

Q. From about 1936 to 1945 or '46, is that it? A. Yes, sir.

716Q

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Q. While you were employed as Manager of the Evanston Branch, who were your immediate superiors? A. Mr. Eggleston.

Q. And who else? A. Well, above him would be
716R our Head Office. He was my immediate Supervisor.

Q. During all the period you were Manager of the Evanston Branch? A. No, sir.

Q. During what period was Mr. Eggleston your immediate Supervisor? A. They changed their Supervisors periodically. It was Eggleston, then Larson.

Q. Do you know his first name? A. E. Larson. Then I believe Cameron Peck, and then Moller.

Q. His first name? A. Adolph. Then I had Mr. Buthman for a short period of time.

Q. What is his first name? A. R, Roy.

Q. During what period of time was Mr. Eggleston your immediate superior? A. When I went in as Manager of the Evanston Branch.

Q. 1936? A. Approximately.

Q. For how long a time? A. I wouldn't be
716S able to say.

Q. With respect to Mr. Larson, when was he your superior? A. After Mr. Eggleston was taken down to the Head Office.

Q. Mr. Eggleston was your superior until he was taken down to the Head Office? A. Yes, sir.

Q. Whatever time that was? A. Yes, sir.

Q. Then Mr. Larson became your immediate superior? A. That is right, sir.

Q. How long was he your immediate superior? A. I don't remember.

Q. Can you fix it by any event that took place at that time? A. Not particularly.

Q. When did Cameron Peck become your superior, your immediate superior? A. He followed right in rotation.

Q. Followed Larson? A. Yes, sir.

716T Q. For how long a time? A. Possibly two years.

Q. How about Mr. Moller? A. About a year.

Q. And Buthman? A. Just a few months.

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Q. They were your superiors in the order you have named them—Eggleston, Larson, Peck, Moller, and Buthman, is that right? A. As near as I can recall.

Q. Did the Evanston Branch while you were Manager serve both retail and wholesale routes? A. Yes, sir."

Mr. Hart: Now, if the Court please, I want to interrupt at this point. The fact is that the Evanston Branch served wholesale stops only until the formation of the Elston Store Division, which occurred, I believe, in early 1941. I merely make that statement so that you can see the nature of my objections at a later point.

The Court: Very well. Proceed.

(The reading of the deposition was continued.)

716U "Q. Do you recall during that period about how many wholesale accounts it had? A. As to the exact number, no, sir.

Q. Can you give us any idea? A. A very large percentage of the business.

Q. What I was after was some approximation of the number of wholesale accounts? A. No, sir.

Q. A couple thousand? A. I wouldn't want to guess. I don't recall."

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718 And thereupon the following further proceedings were had herein:—

COLLOQUY BETWEEN COURT AND COUNSEL

By the Clerk: The case on trial.

The Court: All right. Are you ready to proceed with the deposition?

Mr. Jinkinson: Counsel for the defendants, Mr. London, I believe, handed me the ninth volume of the record, in which there are two obvious errors we would like to correct at this time.

The Court: All right.

Mr. Jinkinson: That we have agreed upon.

The Court: All right.

Mr. Jinkinson: On the second line—

The Court: On what page?

Mr. Jinkinson: Page 774.

Mr. Ball: Page 774 of the record?

Mr. Jinkinson: In the regular record.

The Court: What is the correction?

Mr. Jinkinson: Ridgeview should be Bowman.

The Court: All right. Let the record be corrected accordingly.

Mr. Jinkinson: There is a garbled statement on page 769, at the bottom of the page.

I think this should read:

"Your Honor, this is the first time, I think, that
719 we have a clear-cut issue in reference to the dead man's statute since it came up for the first time. Since that time we briefed the law; I would like to be heard on it."

The Court: And my answer was:

"The ruling will stand."

Mr. Jinkinson: That is right.

The Court: Your remarks may be corrected in accordance with your present statement.

Mr. Jinkinson: Thank you, your Honor.

The Court: Are you ready to proceed with this deposition?

Mr. Jinkinson: Your Honor, would it be all right if we interposed with a witness, or would you rather that we go ahead with the deposition? We have a witness who is very short. But we will go on with the witness, if the Court please.

The Court: Whichever you prefer, since we have stopped with the deposition we might as well leave it and come back to it later.

Mr. Jinkinson: We will put the witness on; he will be very short. Then we will go back to the deposition.

The Court: Then you can go back to the deposition.

719A DEPOSITION OF CHARLES C. HEINZ (Continued)

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"While you were manager of the Evanston Branch, did you have any conversation with Mr. Eggleston? A. Yes, sir.

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Q. With respect to the sharing of bids with competitors on an alternate basis, bids, that is, submitted to the government or other public institutions?

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A. I say yes, sir.

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Q. Did you have more than one conversation with Mr. Eggleston? A. It was repeated, sir.

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Q. Over what period of time were these conversations?

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A. Approximately six months.

Q. About when did you have the first conversation? A. I don't recall the period of time, but it was at the beginning of the opening of the bids that were sent out from Fort Sheridan and Great Lakes.

Q. Well, do you recall about what year that would be? A. It was the beginning of the second war, World War.

Q. Can you tell us something of the date of that conversation with respect to the date of the document? A. It would be prior to this time.

Q. Prior to August 3? A. Yes.

Q. 1942? A. Yes, sir.

719B Q. About how long prior? A. I couldn't say, sir.

Q. Well, in months, can you tell in months? A. Possibly six months.

Q. Where was that conversation? A. At my office.

Q. Will you tell us what was said in that conversation? A. He told me that Great Lakes and Fort Sheridan would be shared on an alternate basis with Borden Dairy Company.

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Q. How long after that was the next conversation with Mr. Eggleston about that matter? A. He made it more or less a practice to keep you informed as to what was happening, and that was periodically over a long period of time.

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Q. About how many such conversations did you have with Mr. Eggleston on that subject?

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A. Oh, at least a half dozen times.

Q. During that six months' period? A. Yes.

Q. Where did the remaining conversations take place? A. When we would go out to lunch.

Q. Any other place? A. Not with Mr. Eggleston, no, sir.

Q. Just confine it to Mr. Eggleston, the places where those conversations occurred. A. At restaurants.

Q. Can you tell us the approximate time that the second such conversation occurred with Mr. Eggleston, how

long after the first conversation? A. Approximately a couple of weeks.

719D Q. Where did it take place? A. At my office.

719E

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A. He said that the contracts were definitely shared, and they were getting their fair share of the business.

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Q. Was that all the conversation? A. Yes.

719F Q. And when approximately was the next conversation? A. Possibly a month later.

Q. And where did it take place? A. At my office.

Q. What was said at that time? A. He informed me as to the amount—

Q. State what he said and what you said. What did he say? A. He told me how much business they were getting out of these two particular accounts.

Q. Did he mention what accounts? A. Fort Sheridan and Great Lakes.

Q. Did he say anything else? A. Not that I can recall, sir.

Q. When about was the next conversation you had with Mr. Eggleston on that subject? A. I don't recall when the next conversation was.

Q. How long after the last conversation? A.

719G Possibly a month.

Q. And do you recall where that was? A. At my office.

Q. And what was said at that time? A. I don't recall what was discussed at that time about it.

Q. Well, can you tell us about how frequently these conversations occurred following your first one with Mr. Eggleston on this subject? A. At least once every two to four weeks.

Q. For a six-month period? A. Yes, sir.

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Q. Can you repeat now the substance of any other conversation on this subject that you had with Mr. Eggleston during that period?

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Q. Can you tell us what dairy or dairies, other than Bowman, was mentioned in these conversations? A. Just the Borden Dairy Company.

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Q. During these conversations what position did Mr. Eggleston occupy in the Bowman Company? A. Sales Supervisor.

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Q. What was that, a sales supervisor over the entire Bowman organization? A. Over a number of divisions.

Q. Do you know which they were at that time? A. Highland Park, Evanston, Rogers Park, Irving Park, and, I believe, North Division.

Q. Do you know D. Cameron Peck, whose name appears on the document— A. Yes, sir.

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Q. Did you have any conversations with D. Cameron Peck about sharing bids on alternate basis of bids submitted to the Government or other public institutions?

719J

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A. No, sir.

Q. Do you know the Mr. E. J. Larson whose name appears on the document? A. Yes, sir.

* * * * *

Q. Did you have any conversations with Mr. Larson? A. No, sir.

Q. With respect to the sharing of bids of institutions on an alternate basis? A. No, sir.

Q. Do you know a Mr. Rehorst, or did you know a Mr. Rehorst in the Bowman organization? A. Yes, sir. R-e-h-o-r-s-t; that is Arthur.

Q. Will you give us his first name, if you know it? A. Arthur.

719K Q. Did you have any conversations with Mr. Rehorst about the sharing of bids on an alternate basis? A. Yes, sir.

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Q. And about when did you have such a conversation? A. When bids were opened up at the beginning of the war.

Q. 1942? A. Yes, sir.

719L

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Q. And what was Mr. Rehorst's position at that time? A. Division manager.

Q. Of what division? A. Highland Park Division.

Q. And where did that conversation take place? A. On the borderline between Glencoe and Winnetka.

Q. Will you give us this conversation with Mr. Rehorst? A. He told me that the bids for Fort Sheridan and Great Lakes were to share alternately with the Borden Dairy Company."

Mr. Ball: I move to strike for the further reason that no groundwork has been laid showing any basis of information that Mr. Rehorst might have about such matters, or his competency as a witness.

The Court: That goes to the weight of the testimony. Objection overruled.

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"Q. Mr. Heinz, did you have any further conversations with Mr. Rehorst on the subject of alternate bidding? A. No, sir.

Q. Just the one conversation? A. Yes, sir.

Q. Was there anything else that was said at that conversation that you now can remember? A. No, sir.

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Q. Mr. Heinz, did you talk with anybody else in the Bowman organization besides Mr. Eggleston and Mr. Rehorst about sharing the bids with competitors? A. No, sir.

719N

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Q. And what were the duties of the solicitors, or those engaged in solicitation? A. To obtain new business, and to endeavor to get old business back, and to hold business that was contemplating on discontinuing service.

Q. Were you instructed from time to time with respect to the procuring of new business, or what your solicitor should do? A. Well, there was a definite duty that the man had to perform, and that was his position. You needed no instructions for that, Mr. McCareins.

* * * * *

719NN Q. Well, did you get any instructions from time to time with respect to the solicitation of business? A. Yes, sir.

Q. Written or oral? A. Mostly oral. It was seldom written.

Q. In the course of those instructions was the term 'open competition' used? A. Yes, sir."

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Mr. Ball: I object to this because the time, whether before or after 1940 with respect to these instructions is not affirmatively shown.

Mr. Hart: I think, if the Court please, as the testimony develops from here on out, it will show that this was a conversation that he has allegedly had with Mr. Curtin during the time he was an assistant manager at the Irving Park division, which was prior to 1936.

The Court: Well, I had better read it and see.

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Mr. Hart: What time was it when he first became manager of the Evanston branch?

Mr. Ball: He testified 1936.

Mr. Hart: He testified 1936.

The Court: I thought he remained the manager of the Evanston branch through part of 1941.

719NNN Mr. Hart: Yes.

The Court: Overruled.

"Q. The time is whenever you first became manager of the Evanston branch. A. That is right.

Q. What did he tell you?"

The Court: Yes, I previously held that he remained manager of the Evanston branch down through part of the period of this complaint; therefore, I will let these instructions go in unless on cross examination it develops that they were changed subsequent to 1940.

* * * * *

The Court: A conversation offered here is a conversation that occurred in 1936.

Now, as to any general instructions that he received and remained in effect through his period until 1941, I think are material as to a conversation that occurred in 1936 that is more than general in its nature, I would sustain the objection.

Let me read down here a little bit.

Yes, with the understanding that it applies only to the years 1940 and 1941, you may read the rest of it.

(Mr. Long read as follows:)

"He explained who was open competition, and who was closed competition.

* * * * *

Q. What did he say? A. As closely as I can recall, he said that Borden and Beloit were about the only two on the North Shore that was closed competition.

Q. What was open competition? Did he tell you? A. All the small dealers.

719O

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Q. Did you ever have a discussion with Mr. Eggleston about the matter of making up the Minutes of those meetings? A. Yes, sir,—

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Q. When? A. While I was Manager of the Branch.

Q. About what time? A. 1945, in there.

Q. And where was that conversation? A. In the Evanston Branch.

Q. Who was present? A. Just Mr. Eggleston and myself.

Q. What was that conversation? A. He told me that written Minutes of our monthly foremen meeting were a very nice thing, and it should be done each and every month."

Mr. Hart: If the Court please, I want to point out that this is approximately two years after Mr. Eggleston left the company.

The Court: That is an inaccuracy you can argue when you are arguing the weight of the evidence. It is the testimony of this witness, nevertheless.

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719Q

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"Q. Mr. Heinz, the farm-out was a device by which you could avoid the implication of who was taking business from someone else, is that not right? A. Yes.

Q. You made extensive use of it while you were

719R manager at the Evanston Division, is that true? A. That is correct.

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Q. Now, your territory did not include the Great Lakes, did it? A. No, sir.

* * * * *

Q. And with Bowman Dairy Company it did not include Fort Sheridan? A. No, sir.

Q. Now, Hawthorn Mellody was open competition at all times, wasn't it, that you were with Evanston? A. We

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had instructions in so far as Hawthorn Mellody was concerned.

Q. But it was open competition as you call it, is that right? A. We were given instructions as far as Hawthorn Mellody was concerned.

719T Q. What were those instructions? A. That we were not to bother any of their business for fear of retaliation.

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Q. Who were some of the dairies that you used on these farm-outs to hold the business before you took it over? A. Borden.

Q. Well, when you took a farm-out against Borden, to whom would you turn it over? A. To any small dealer.

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719V

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Q. Personal acquaintance with the storekepers was very important, wasn't it? A. In Evanston, yes, sir.

Q. And you were pretty successful in making yourself pretty well acquainted with every storekeeper, is that right? A. Every account that carried any amount

719W of volume.

Q. And you managed to develop a very wide personal acquaintance among the storekeepers? A. And wholesale accounts.

Q. And wholesale accounts? A. Yes.

Q. And you secured quite a bit of new wholesale accounts in that manner, did you not? A. I held those accounts in that manner.

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719X Q. What were some of the larger grocers in Evanston at that time? A. I forgot the names.

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719Y

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Q. You had a good many farm-outs that were never discovered by the competition, did you not? A. Chiefly Borden."

* * * * *

719Z Mr. Jinkinson: Page 1388, the last answer, "He told me that the bids for Fort Sheridan and Great

Lakes were to share—I believe the deposition reads "were shared."

The Court: Let the record be corrected accordingly.

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725 Roy W. Buthman, a witness, heretofore called on behalf of the Government, having been heretofore first duly sworn, resumed the stand, was examined and testified further as follows:

Direct Examination by Mr. Jinkinson (Continued):

Q. Mr. Buthman, did you know a Mr. Englehart who worked for The Borden Company during the time that he worked for it? A. Yes, I knew him.

Q. What was his position in 1946? A. As I recall it, I believe he was sales manager of the Borden Dairy Company.

Q. Was he sales manager in 1946? A. That I wouldn't know.

Q. Do you remember ever having any discussion with Mr. Englehart with respect to the wholesale business?

Mr. Ball: Objected to on the ground that the pretrial order shows that Mr. Englehart is dead.

The Court: What was Englehart's position?

726 Mr. Jinkinson: Sales manager.

The Court: In this company?

Mr. Jinkinson: Of the Borden Dairy Company.

The Court: Borden Dairy Company.

The objection is sustained.

* * * * *

732 Colloquy Between Court and Counsel

The Court: Now, how long will Mr. Newey take?

Mr. Jinkinson: Getting back to the Newey proposition, I have subpoenaed Mr. Newey, and in order to refresh his memory, I sent him over to Mr. McConnell's office to see some tapes that he had, that Mr. McConnell had in court here one day. Mr. Newey has the tapes in his possession.

It is a question of whether or not this court is going to hear those tapes, and if the Court is going to hear them the Government, of course, would like to have permission from the court to set up in the court room the necessary equipment so that the tapes can be played.

The Court: Do I understand that Mr. McConnell is now waiving his privilege with reference to these properties? He produced them here, as I recall, in obedience to a sub-

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poena duces tecum, and then having produced them, said they were his personal property, the result of his own investigation, and his own expenditure of funds in connection with preparing another case, and, that therefore he claimed the privilege, and I honored his privilege.

Now, what is the situation? Is he waiving it, or what?

Mr. Jinkinson: I have a letter, and now I think is
733 the appropriate time to pass it to your Honor to read.

The Court: Let's see what the letter says.

Mr. Jinkinson: I think that states Mr. McConnell's position, and the Government's position.

(Handing document to the Court.)

The Court: He has stated his position when he was here. He did, didn't he? Has he changed it?

Mr. Jinkinson: I only know what is contained in that letter, your Honor.

The Court: Let's see what he says.

This is a letter to Mr. Newey.

Mr. Jinkinson: Right.

The Court: Well, in this letter Mr. McConnell apparently authorizes Mr. Newey to refresh his recollection from certain tape recordings, which I assume are the same tape recordings that Mr. McConnell in open court here refused to deliver to the court, or asked the court to authorize him to refuse to deliver in obedience to the subpoena, and which request of Mr. McConnell I granted.

I take it that the witness Newey will refresh himself from those, if he cares to, or if he needs to, and as far as playing them here, the ruling made at the time Mr. McConnell asked for it still stands.

734 There is no use of producing the tape recordings here. If he needs it to refresh his recollection, let him refresh it before he gets on the stand.

Has he already done that?

Mr. Jinkinson: He is doing it now.

The Court: How long will it take him?

Mr. Jinkinson: He will be ready tomorrow morning at 10:30.

The Court: How long will his testimony take?

Mr. Jinkinson: I wouldn't want to make a guess. He had eight conversations with eight different representatives of dairies. Some of them lasted as much as 35 minutes or an hour, but, of course, he can't remember all that. He can remember the substance of them.

The Court: Very well.

Mr. Ball: We shall demand, of course, the defendants, that we be given the opportunity to see the documents or material that the witness is permitted to use to refresh his recollection.

Mr. Jinkinson: Of course, we violently object.

Mr. Ball: That is a standard principle.

The Court: If we do that, then we are going to be
735 here for a week listening to tape recordings that Mr. McConnell says he doesn't want us to hear, and which I sustained him in his objection to turning over.

I assume, at least to make it a little clearer, I ruled that the witness may refresh his recollection by conference with counsel, or by review of documents, or anything else that he wants to do before he takes the stand. Now, what you are citing, Mr. Ball, is that any document or other material that he uses while on the stand to refresh his recollection is subject to defense examination, and that rule, of course, I will abide by if he uses any such documents.

But what he does before he comes in here to take the stand, either in conference with counsel or otherwise, is pretty largely his own business and theirs.

I so rule. Is there anything else?

Mr. Jinkinson: Nothing, your Honor, that I can think of, and I would like to start with Mr. Newey tomorrow morning at 10:30.

The Court: And then Monday you won't take too long?

Mr. Jinkinson: I assume it will be very short with Mr. Bender Monday.

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Paul D. Newey a witness, called on behalf of the Government, having been first duly sworn, was examined and testified as follows:

Direct Examination by Mr. Jinkinson:

Q. Please state your name? A. Paul D. Newey.

Q. Where do you reside? A. 1120 Fullerton Avenue, Chicago.

Q. Are you a graduate of a university? A. Yes,
739 I am.

Q. Are you a member of the Bar? A. Yes, sir.

Mr. Ball: Will you speak up, Mr. Newey, it is difficult to hear you.

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By Mr. Jinkinson:

Q. Are you admitted to practice in the State of Illinois? A. Yes, I am.

Q. Are you admitted to practice in this Court, the U. S. District Court of the Northern District of Illinois? A. I am, yes, sir.

Q. Mr. Newey, were you ever employed by Mr. Thomas McConnell to make an investigation? A. Yes, sir, I was.

Q. About what year; what time? A. It was during the month of April of 1950.

Q. Were you employed to make an investigation for the purpose of securing evidence to substantiate a complaint which Mr. McConnell had filed? A. Yes, I was.

Q. Mr. McConnell is a lawyer practicing in Chicago?

740 A. Yes, sir.

Q. Did he show you the complaint? A. He did.

Q. Did you read it? A. I did.

Q. Did you make any other preparation preparatory to making an investigation? A. Well, I conferred with Mr. McConnell and he told me what facts they were attempting to establish and asked me if I could assist him in gathering evidence to establish those facts.

Q. Did you have any experience prior to that time in the making of wire recordings or the taking of wire recordings? A. Yes, sir, I did.

Q. What was your experience in that connection? A. I was an agent for the Government from approximately September of 1940 until August or September of 1947.

Q. During that time did you work with wire recordings, microphones and the placing of these instruments around rooms? A. Yes, sir, I did, and I also had special instructions in the use of wire recorders.

741 Q. Did you know a James Soter? A. Yes, I met James Soter through Mr. Hodinotte.

Mr. Ball: That is S-o-t-e-r?

Mr. Jinkinson: Yes, isn't that the correct spelling, S-o-t-e-r?

The Witness: Yes, sir.

By Mr. Jinkinson:

Q. You met him through who? A. Mr. Hodinotte, who is connected with the Dean Milk Company.

Mr. Ball: How do you spell that?

The Witness: H-o-d-i-n-o-t-t-e.

I am not sure of that spelling.

By Mr. Jinkinson:

Q. Where did you first meet Mr. Soter? A. At the Dean Milk Company plant on West North Avenue. I believe it is in Melrose Park.

Q. Was Mr. Soter in business, do you know? A. Yes, he was.

Q. What business was he in? A. He had a grocery store at 4761 North Milwaukee Avenue. He also worked for the Dean Milk Company as a solicitor.

742 Q. Did he have someone operating the store for him or did he spend part time soliciting and part time in the store? A. He had someone working for him in the store and he did spend a little time in the store, but I don't believe he spent very much.

Q. Did you go to 4761 North Milwaukee Avenue? A. Yes, sir, I did.

Q. Will you describe briefly the store which Mr. Soter was operating at that time? A. The store was a small one. I would say that the dimensions were approximately about 18 or 20 feet in width and about 30 to 35 feet in length and there was a back section which separated the front by a walk-in refrigerator box and a small partition. The partition had a door on it. The back or ante-room was about 12 or 14 feet in width and about 6 feet in length.

Q. Was there anything unusual about the grocery store or was it just an ordinary— A. It was a small store. He did more of a vegetable business than anything else, fresh vegetables.

Q. Do you recall the first time you went to the store?

743 A. Yes, I do. I went there about three days prior to the 18th of April, 1950, to make a physical survey of the store and to see what I might be able to do with setting up a tape recorder and microphone, using it to get evidence in Mr. McConnell's case.

Q. Incidentally, the name of that case was the Dean Milk Company vs the American Processing and Sales Company and others? A. That is correct.

Q. Did you determine at the first inspection that it was possible to install a microphone or recording machine in the premises at 4761 North Milwaukee?

The Court: Do you need all these details? You want to get into the conversation.

Mr. Jinkinson: That is right.

The Court: That is all we are concerned with here. Let's get on with it.

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By Mr. Jinkinson:

Q. You did set up a microphone and recording machine in the place? A. Yes, sir, I did.

Q. It was connected in such a way that you could pull a light chain that would turn it on and off? A. Yes, sir.

744 Q. Where did you establish it, in the back end of the store? A. In the back end of the store. That is in the ante-room. It was separated from the store proper.

Q. In the back part of the store? A. In the back part of the store.

Q. After you got the machine set up did you make any calls to any dairies to determine whether or not they would like to solicit your milk business at that store? A. Yes, sir, I did.

Q. Who was the first one you called? A. The first one I called was Hawthorn-Mellody Farms.

Q. Did anyone respond from Hawthorn-Mellody Farms to see you? A. Yes, sir, they sent a representative by the name of Frank Kost.

Q. What day was this? A. That was on the 18th of April, 1950.

Q. Do you remember about what time? A. It was about 3:00 o'clock in the afternoon.

745 By Mr. Jinkinson:

Q. Did Mr. Kost come to the store? A. Yes, sir, he did.

Q. Was anyone with him? A. No, there was not.

Q. Was anyone present with you when you first saw him? A. When I first saw him come in the store, the gentleman that assisted Mr. Soter, or worked for Mr. Soter, was working in the front part of the store.

Q. Did you take Mr. Kost to the back part of the store? A. Yes, I did.

Q. Did he give you a card? A. Yes, he did.

Q. Do you have it with you? A. Yes, sir, I have. (Handing document to counsel.)

Q. Is this the card that you hand me, is this the one that you received from Mr. Kost that day? A. Yes, sir, it is.

Mr. Jinkinson: The Government offers into evidence Exhibit No. 1152.

By Mr. Jinkinson:

Q. Now, did you have a conversation with Mr. Kost
746 that day? A. Yes, sir, I did.

Q. Will you tell the Court whether the conversation was with reference to his soliciting your milk business? A. Yes, it was.

Q. Will you tell the Court what you said and what he said in that conversation on the 18th day of April? A. May I refresh my memory?

Q. Do you have something to refresh it with? A. Yes, sir, I have.

Q. You may. A. Mr. Kost told me that it was fortunate for me that I had Dean's milk in the store there, because he wouldn't be able to do business with me otherwise.

He said that the store down the street, which was about 4 or 5 doors away, had been closed, and had C. J. Weiland, and— May I refresh my memory again, please?

Q. Yes. A. He said the store down the street had Capitol and C. J. Weiland in, and he wasn't able to solicit their accounts because of that fact, but that he had been trying to get the store that I was in from John whom he thought was the owner and operator of the store.
747 John was only the employee of Mr. Soter, but apparently Mr. Kost thought John was the owner of the store.

Mr. Ball: I move to strike what the witness' interpretation is.

The Court: Sustained. That part may be stricken. What else did he say, and what did you say?

By the Witness:

A. He told me that he could take Dean stops, because Dean didn't cooperate with the other dairies.

May I refresh my memory again?

Mr. Jinkinson: Yes.

By Mr. Jinkinson:

Q. Did he name the other dairies to you?

Mr. Ball: We object to this conversation going in, because the witness is reporting only what Mr. Kost has said, without reporting what he said to Mr. Kost.

The Court: Yes. Refresh your recollection and state in substance the conversation you had. What you said, and what he said.

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By the Witness:

A. All right. May I refresh my memory?

748 Mr. Jinkinson: Yes, go ahead.

By the Witness:

A. All right. I asked him why he could take Dean stops where he wasn't able to take others, as he had told me he could.

By Mr. Jinkinson:

Q. And what did he tell you? A. And he told me that Dean was one of the companies that did not cooperate with the others, and, therefore, he was open business for all the other companies, and they could come in and take Dean stops any time.

Q. Did he name the dairies whose stops could not be taken? A. Yes, he named several dairies.

Q. And what dairy did he name? A. He named Weiland, he named Bowman, and he named some others. I would have to refresh my memory again.

Q. Will you do so? A. He named Western United. He named Borden's. And he named Beloit.

Q. Now, did he make you any offer for your milk business? A. Yes, sir, he did. He offered me $200 in cash for my milk business, provided that I would sign a
749 contract to do business with them for a period of one year.

Q. Did he show you the contract at that time? A. He did not show me the contract at that time, no.

Q. Did he tell you how the money would be paid, in cash or check? A. He told me the money would be paid in check.

Q. Did he offer you anything besides the cash, in the form of a rebate, discount? A. He told me that I would get the regular 3 per cent rebate at the end of each month they gave to all their customers.

Mr. Ball: I object again to the conversation being limited only to the comments of what the other party said, without the remarks of this man in the conversation.

The Court: Sustained. State what you said.

The Witness: Well, may I refresh my recollection.

The Court: Yes, refresh your recollection and give us the whole conversation. The rule of evidence is clear, Mr. Jinkinson. He must first exhaust his own recollection.

Mr. Jinkinson: Yes.

750 The Court: Then let him refresh it, and exhaust it before you can ask him did he say this or that.

Now, state the conversation. Refresh your recollection now for the fifth time, and refresh it good, and give us now the whole conversation. Then you may examine after that; what you said and what he said.

By the Witness:

A. Well, I can't. It is difficult for me to remember exactly what I said and what he said.

The Court: Have you exhausted your recollection?

The Witness: No, I haven't.

The Court: Then exhaust it first.

The Witness: Well, I have exhausted my own recollection. I haven't exhausted my means of refreshing it.

The Court: That is what I am asking you to do. Refresh your memory and then tell us the whole conversation as best you can.

The Witness: All right, your Honor.

The Court: Let him do that before you ask any other questions.

751 Mr. Ball: I object to the use of this as refreshing his recollection, until it is identified as to what it is, and whether the witness made it.

The Court: What are you using to refresh your recollection?

The Witness: This is a transcript, your Honor, of the tape recordings that were made on that date.

The Court: Now, what are you going to have him do? Are you going to read the whole thing, is that it? How long will that take?

The Witness: I am not going to read the whole thing. I was just going to refresh my memory as to the question and the answer.

The Court: All right, go ahead. Now you know what he is using. Go ahead.

Mr. Ball: I object to the use of this document for refreshing the witness' recollection, as it is not shown this is a document or memorandum prepared by the witness contemporaneous with the events, and not prepared by the witness at all.

Mr. Jinkinson: I don't understand the rule to be

752 that he has got to prepare it.

The Court: When was this document prepared? Are you using now a transcript from the wire recorder?

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The Witness: From the tape recorder, yes, your Honor.

The Court: Who prepared it?

The Witness: It was prepared by Leon M. Golding and Associates from the tape recordings which were played by me to their Reporter.

The Court: Very well. The objection is overruled.

By the Witness:

A. Well, I asked Mr. Kost whether or not he was going to take the account of the Royal Blue Store which was down the street, or whether he had ever tried to take that account, and he told me that No, he couldn't, they had Capitol in there, and C. J. Weiland, and there was no way in the world he could take that stop, because there was an agreement between his company and their company whereby he couldn't take the stop.

Now, may I refresh my memory again?

Mr. Jinkinson: Yes.

753 By the Witness:

A. I asked him whether he could take a Borden stop, and he told me he couldn't. I asked him whether he could take a Western stop, and he said he couldn't.

I asked him whether he could take a Capitol stop. He said he couldn't. I asked him whether he could take a Dean stop, and he said definitely he could take a Dean stop, and all the other dairies could take a Dean stop because Dean was open competition.

I asked him what he meant by Dean's being open business. He said that Dean's did not play ball or cooperate with the other dairies, and therefore they were all after his business.

Now may I refresh my memory again, please?

I asked him whether there were any times he could take another dairy stop besides a Dean stop. And he said that there were—

He said that the times that they could take another dairy stop would be only where another dairy would take a stop away from them, and then to get even they could take one of the dairy's stops that had taken one of their stops away from them.

I asked him whether there was any other time that he might be able to take another dairy stop. He said
754 No, but if I called in Dean's for a period of from 90 to 100 days, and another dairy had been in there,

that then the stop was open for all the other dairies to solicit. But for a period of 90 days, 90 or 100 days that stop was closed, and none of the dairies except the original dairy that was in there could solicit that stop.

I asked him whether or not there were other rebates given to customers of the various dairies, including his own, that were different from the rebate that he was going to give me, that is, 3 per cent.

He told me that they had cut that out, but they had been doing that, and he said that Borden and Bowman had been doing it with the Jewel Store, and, in fact, he even said Dean's had been doing it with the National Tea.

Mr. Ball: I move to strike out what he said that Borden and Bowman were doing with respect to these stores, being hearsay.

The Court: That is subject to a motion to strike at the end of the testimony. He is relating now the full conversation, and I think we should have the entire conversation. Whether or not it is material is something else
755 again.

Now, I will entertain your motion when he is finished.

By the Witness:

A. I asked him whether or not I could get the same deal, that is, a cash deal from either Bowman or Borden. And he told me that their hands were tied at the present time, and they weren't giving away anything, that his company was one of the companies that was making cash deals, and that because of the trouble that Borden and Bowman had gotten themselves into, they couldn't do it any more.

He continued telling me that Bowman and Borden had been indicted, but he said that his company was not under that indictment, and that is the reason that he could continue giving out the cash money.

I asked him whether or not he was sticking his neck out when he offered to give me cash money, and he said no, he wasn't, that he was doing it every day.

He told me, in fact, that within the last month he had given out between 25 and 26 checks, to various customers that he had gotten.

I asked him whether they had any other kind of a deal that I could make besides getting the $200 in cash,
756 and he told me that the company would loan me money for equipment.

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But he said that I had to have collateral to get the equipment.

I asked him what he meant by collateral, and asked if the store fixtures in my store were sufficient, and he said no, they weren't.

757 I asked him how they figured out the amount of money. I asked him how they figured out what my store was worth, that is, the two hundred dollars that he offered.

And he told me that it was according to the amount of milk that I purchased each day.

In fact, before he had determined that he would give me two hundred dollars, he had asked me to produce my milk bills for the past week, and after looking over the milk bills for the past week, he decided the stop was worth two hundred dollars in cash.

I asked him if there were any other ways of soliciting stops besides paying out cash money.

And he told me that sometimes they bought the licenses for the store; and, naturally, they tried to get the stop as cheap as they could. So he illustrated an instance where he had bought one grocer a grocer's license, a milk dealer's license, by giving her the cash money, and giving her in addition a little bonus to go out and buy herself a hat.

I asked him what else they had to offer as an in-
758 ducement for me to do business with them.

And he told me that they had a sixteen-horse hitch and a wagon that they would parade around through the neighborhood with my—with the name of my grocery store and the address of the grocery store on the wagon.

And he told me that they would give me—print circulars for me, to be distributed in the neighborhood, letting them know that I had just opened up business—the store had been opened under new management, and I was handling Hawthorn-Mellody Farms' milk.

And he told me that they would give me 100 free gifts of sour cream and cottage cheese which, he stated, were slow items, and that anything that I made on that sour cream and cottage cheese on the day of the grand opening would be clear profit for me.

He told me in addition to that they would give me a neon sign, a neon electric sign.

That is all.

The Court: Does that finish the conversation?

The Witness: Yes, sir.

759 The Court: Very well. Have you any other questions?

Mr. Hart: If the Court please, may we have the record show that between each statement that Mr. Newey made in answer to the question and the answer he gave, he referred to the transcript?

The Court: Yes, the record may so show.

I think the transcript, from which he constantly read before each statement or two should be identified in the record and given a number.

Mr. Jinkinson: All right.

Mr. Ball: Also the notes.

The Court: Yes. Which notes did he use? Let those be marked too.

The transcript is what?

Mr. Jinkinson: The next number, your Honor is 1153.

The Court: 1153 for identification.

(The document referred to above, being a transcript of testimony, was marked by the Government as
760 Government's Exhibit No. 1153 for identification.)

The Court: And the notes?

Mr. Jinkinson: 1154.

The Court: 1154 for identification.

(The document referred to above, being notes, were marked by the Government as Government's Exhibit No. 1154 for identification.)

The Court: Proceed, Mr. Jinkinson.

Mr. Hart: It may save time if we are permitted to look at those now.

The Court: Is he finished with those? Are you?

By Mr. Jinkinson:

Q. Are you finished with this one?

The Court: With this conversation?

The Witness: I would like to look over my notes once more.

The Court: Are you finished with the transcript?

The Witness: With the transcript? Yes, your Honor.

The Court: Give the transcript to the defense.
761 Go ahead, Mr. Jinkinson.

By Mr. Jinkinson:

Q. Now, did you have a subsequent conversation with Mr. Kost later, later in the day? A. No, sir, I did not.

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Q. Did you see him the next day? A. I saw him the next night.

Q. And at the same place? A. At the same place.

Q. And was he alone? A. Yes, he was alone, but I wasn't.

Q. Who was with you? A. Mr. Willard S. Olson.

Q. Was the conversation in reference to delivering a check to you for payment of the stop? A. Yes, the conversation was concerning that, and it also concerned a reiteration of what he had already told me the day before for the benefit of Mr. Olson.

Q. Did he deliver a check to you? A. Yes, he did.

Q. And in what amount? A. In the amount of two hundred dollars.

Q. Did he also deliver a contract to you? A. Yes,
762 he did.

Q. Did you sign the contract? A. Yes, I did.

Q. Did he leave a copy of the contract with you? A. No, he didn't leave a copy of the contract with me. He told me it was illegal. He told me that the contract was illegal.

Q. He told you the contract was illegal and so he did not leave a copy with you? A. He told me that the contract was illegal, of no import. He told me it was a matter of form.

Q. He would not leave a copy with you? A. No, sir.

Q. Did you accept the check? A. Yes, I accepted the check.

I kept the check, but I never did have it honored.

Q. Did you subsequently give it back to him, or return it to him? A. Yes, I returned it to him several days later.

Q. Did you get the contract back from him? A. I tried to get the contract back, but he wouldn't give it back to me.

He told me that the thing was illegal, anyhow, so
763 it would not have any import.

Q. Did you ask him to destroy it? A. I asked him to destroy it, and he promised he would destroy it.

Q. Now, subsequent to the second visit of Mr. Kost did you call any other dairy? A. Yes, I did.

Q. Which one did you call then? A. I called Bowman Dairy on the 19th of April, 1950.

Q. And did anyone respond from the Bowman Dairy Company? A. Yes, sir.

Q. Who? A. A Mr. Robert Mills.

Q. From the Bowman Dairy? A. No. Borden. Borden Dairy.

Q. Did you call Bowman? A. I called Bowman, but nobody ever responded from Bowman.

Q. Did you then call next the Borden? A. I next called Borden on the 19th.

Q. That was Robert Mills?

The Court: Was that April 19, 1950?

764 The Witness: April 19, 1950.

By Mr. Jinkinson:

Q. Mr. Robert Mills responded from the Borden Dairy Company? A. Mr. Robert Mills responded from the Borden Dairy Company.

Q. Did he leave you a card? A. No.

He gave me his name and phone number, and I have the original slip that I put his name and phone number—jotted his name and phone number down on.

Q. Do you have it with you? A. Yes, I have.

He also gave me a balloon and a charm: "Elsie the Cow."

The Court: Are you going to ask him to blow it up?

Mr. Jinkinson: I think Borden's ought to blow it up, your Honor.

By Mr. Jinkinson:

Q. Now, did Mr. Mills attempt to solicit your business? A. Yes, sir, he did.

765 Q. Did you have a conversation with him? A. I had a conversation with him.

Q. Was anyone present with Mr. Mills? A. No one except he and I.

Q. Now, what conversation did you have with Mr. Mills with reference to solicitation of the milk business at your store at 4761 North Milwaukee Avenue? A. I asked him what his company could do for me if I decided to do business with them rather than with the party I already had in, which was the Dean Milk Company.

Q. And what did Mr. Mills say? A. He told me it was fortunate for me that I had Dean's in there; otherwise he would not be able to do business with me; that Dean's did not cooperate with any of the other dairies; they did not.

He said they were out taking all the other dairies' stops, and that therefore the other dairies were out to get all their stops.

Now, he also told me many other things that I have to use my notes to refresh my memory.

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766 Q. Go ahead. A. (The witness referred to papers.)

The Court: Are these the same notes that have been marked for identification?

The Witness: No, these have not been marked for identification.

The Court: Give them the next number. Mark them.

Mr. Ball: May we have the other notes if the witness is through with them?

Mr. Jinkinson: Were you through with the first notes?

The Witness: He can have these.

The Court: They were marked?

Mr. Jinkinson: Yes, these were marked (handing papers to Mr. Ball).

(The notes referred to above, being the second batch of notes referred to by the witness, were marked by the Government as Government's Exhibit No. 1156 for identification.)

By Mr. Jinkinson:

Q. You are now referring to Government's Exhibit No. 1156 for identification. Is that right? A. Yes, sir.

767 Q. Well, go ahead. A. Now, when I testify from here on in, it is in response to the general question I put to him as to why I—what he had to offer me that would be an inducement for me to take his milk rather than the Dean milk, which I already had in the store.

The Court: Very well.

What was his name?

By the Witness:

A. Mills told me that neither he, Wanzer or Bowman or Dean could give out any cash to solicit an account, because they were all under indictment.

He said that in all there were five companies involved.

But he told me that his company gave money in a different manner, that is, The Borden Company.

He told me that they gave it in a manner of services and demonstrations; and as part of the services, they would help me to purchase a refrigerator box, if I wanted

768 one, and let me pay it back—pay back the money that would be used on the purchase of the box, pay it back on my milk bill at the rate of one dollar a day.

He said in addition to those things, that they would put on a carnival at my store and give away to children the

balloons, certain balloons with "Elsie the Cow" that they had blown up with gas, and charms.

And he said that they also would have an attractive young lady passing these out.

He told me that as far as the purchase of a milk case was concerned, that the transaction was worked out through his—my receiving a direct check from The Borden Company for the full amount to pay the case cost, and in turn I would turn that check over to whatever company I was purchasing the refrigerator from.

He told me in addition that I would not have to pay any interest on any of the loans that I might make from the company.

And he further told me that he could get me as high as 30 percent off on any kind of box—refrigerator box that I might want to get.

He—I asked him whether there was anything wrong
769 with doing business—with doing this.

And he said, no; that it was an intangible action, and he says:

"As long as you do things on an intangible way," he said, "it is not wrong."

He says, "But if you gave out money, that would be tangible, and it would be wrong to do it."

770 He further stated that his company hadn't given out any money for a period of three years but that prior to three years before the date of the conversation, they did do the same thing as the other companies.

I asked him why some of the other companies could still do it and his company couldn't, and he said "The Government is down on us with the indictment," and he said, "We have to watch every step of the way."

He told me that Dean was also originally paying off by giving away diamonds, wristwatches, and two tickets to Florida. And he told me that Borden was giving out deep freezers as gifts and that is why the Government clamped down on all of them.

The Court: What year was this?

The Witness: About three years prior to the indictment.

By the Witness:

A. (Continuing) He told me that the indictment involved the Patman Act which was passed by a Senator Patman and he said that the law said it was unlawful to disburse monies or to buy business.

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He said, "You can't do it at all any more."

He told me Bowman was probably doing it by giving 7½ per cent in rebates. He told me he had to be
771 especially careful because there was a jail sentence and a $10,000 fine and he had been called in with some of the other company salesmen by the Government and he told me that he could not under any circumstances offer any money.

He told me that in order to get a case from the Borden Company, that is a showcase, display case, or refrigerator, that I would have to sign a contract with them to do business with them for one year.

Mr. Ball: I object again, that this is a conversation of only what one man said and without any comment about what the witness said to the man. It is not a full report of the conversation.

The Court: He said this is all in answer to his one question, what they would do for him, isn't that right?

The Witness: Yes.

The Court: All right, go ahead.

Does that exhaust the conversation?

The Witness: Not quite, your Honor.

The Court: All right, go ahead and finish it.

772 By the Witness:

A. He told me that all the companies cooperate with each other through the Chicago Milk Association except Dean and he told me that the union regulates the retail price of milk.

I asked him about Belmont Dairy and whether or not Belmont was connected with his company, that is, Borden.

He said that it was, and told me that he was quite surprised because very few people knew that.

I then asked him whether or not Belmont was giving any cash allowances to grocers to get the business.

He told me they were, but he could not speak for them, that they worked out their deal separately. However, he thought I might be able to work out a deal where I could get a box from Borden and perhaps a cash deal from Belmont if I put both their milk in the store.

I asked him how the company accounted for the checks that they might give me in order for me to purchase my showcase, and he told me that the check would have to be marked on a basis that the money was loaned to me to replenish stock.

773 He said that further in addition to this I would have to sign a statement to the effect for the benefit of the Borden Company, stating that I was going to use the money solely for the purpose of replenishing stock and not to be used to buy any tangible property.

I asked him whether or not he could bring the Belmont man in so I could talk to him and he told me that his company didn't like to get involved in any deals with Belmont, so that the Belmont man—they would probably send in the Belmont man to make his deal with me separate, so that he, Mills, wouldn't have to witness the transaction.

He told me if I had any other milk at my grocery store excepting Dean's that his company wouldn't be able to solicit the business and that the only time they take any other stop is when the business, the original owner folds up, closes down, a new owner takes over, and tells the company that was already in there that he doesn't want them any more.

I then asked him to get in touch with me on Monday, which he promised to do, and he further promised to let me know by about 2:00 o'clock in the afternoon what
774 he might be able to arrange for me in a deal with Belmont.

By Mr. Jinkinson:

Q. That was about the end of the conversation in that case? A. That was about the end of the conversation in that case.

Q. Did he come back that afternoon to see you? A. Yes, sir, he did.

Q. For a short time? A. For a short time.

Q. What did he tell you on his return, what he could do to arrange for Belmont to see you? A. He told me that he would—

Mr. Ball: May we have those notes now?

Mr. Jinkinson: Just a moment, when he gets through with those.

The Witness: I am through with these.

The Court: Mark the new notes.

By Mr. Jinkinson:

Q. I show you Government Exhibit 1157. A. At a later hour, it was about 11:55 in the morning, and he said that he had called his boss and his boss had called Belmont

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and that Belmont had asked him who I was, where
775 I was located, and what I wanted, and he further explained that after giving them the details of who I was and where I was located and what I wanted that Belmont said they didn't want to do any business with me.

Q. Did he have a further conversation with you in reference to how much he thought the store was worth as a stop, your store? A. He didn't make any comment that I can recall concerning that particular subject.

Q. Showing you Government Exhibit 1155, who is Mr. Shafer? A. In my conversation with Mr. Mills, I asked him for his name and his phone number and he gave them to me and he told me in the event I called the company and didn't find him there that I should ask for a Mr. Shafer and Mr. Shafer would know what it was all about.

Q. Is that the last time you saw a representative from the Borden Company at your place? A. That is the last time.

Q. Did you call another dairy after that?

Mr. Ball: May I have those notes?

(Counsel handing document to Mr. Ball)

776 The Court: What is the answer?
The Witness: Yes, I did.

By Mr. Jinkinson:

Q. Who did you call next? A. I next called Capitol Dairy.

Q. Did someone from Capitol Dairy respond? A. Yes, sir, a gentleman came to see me from Capitol Dairy.

Q. On what day, do you recall? A. That was on the same date that the Borden man was in, the 22nd day of April, 1950.

Q. What was the Capitol man's name? A. His name was Galnick.

Q. Did he present you with a card? A. I don't remember.

Q. Did you have a conversation with him with reference to the soliciting of your milk business at your store, or at the store you were using? A. I did have a conversation with him, yes.

Q. Can you tell the Court what you said and what he said, what the conversation was? A. Yes, sir. May I refresh my memory?

Q. Yes.

The Court: Has that been identified?

777 Mr. Jinkinson: No, I will identify it.

The Witness: I do find a card here from Mr. Galnick.

The Court: Mark the notes also.

By Mr. Jinkinson:

Q. I hand you Government Exhibit 1158 and ask you if that is the card Mr. Galnick gave you on the occasion of his coming to your store on the 22nd of April? A. Yes, sir, this is the card he gave me.

Q. I hand you also Government Exhibit 1159, the notes that you made. A. I called Capitol Dairy on the 22nd of April and talked to a man who identified himself as Sam Fried and told him who I was and where I was located and asked if he would send a man down to see me about doing business with their dairy, which he agreed to do.

At about 4:20 in the afternoon Allen Galnick came to my store and I took him in the back room and we began to talk about the possibility of his putting milk in instead of the milk that I had already had, which was Dean's.

778 I asked him if he could deal with me and he told me that definitely he could inasmuch as I did have Dean's milk in the store.

I asked him if he could do business with anyone else, if anyone else's milk was in the store, and he told me that he couldn't touch anybody else's business but Dean's.

I asked him whether or not he could give me any money as an inducement for me to do business with him, and he told me that his company, that is Capitol, and all the others go along, but he says that Dean doesn't give out a penny.

I asked him if I had to sign any paper to get the money from them and he told me that I would have to sign a one-year contract to do business with them exclusively for one year and that in the event I sold my business or went out of business, within a period of six months or any other period of time less than the duration of a year, that we would have to work it out on a pro rata business and I would have to return that part of the money that would represent those months wherein I didn't buy milk from their company.

I asked him how much my business was worth. He

779 asked for my bills, that is, the milk bills that I had there from Dean, which I showed him, and after looking through the milk bills he told me that he was pretty sure he could get me $250, but if I wanted any more than

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that it might be too high and he didn't think his boss would okay it.

I asked him whether or not he was the final say on the amount of money that was doled out to the various stores and he said that he was not the final say, that his boss was the final say, but generally in nine cases out of ten whatever he recommended went through.

He also explained that each stop had a certain value and that he could figure out the worth of the stop, that is, its cash value, from the milk bills.

He said there was an understanding—strike that—I asked him whether there was an agreement between the various dairies not to take each other's stops, that is, other than Dean's, and he told me that there was an ethical understanding between them, but it was strictly on an ethical basis, and he further stated that all the dairies cooperated in using this understanding excepting Dean.

Dean was unethical.

780 He added to this by saying that with a new account according to the ethical standards that for a period of thirty days it is an open stop and any one of the dairies can go in and get the business.

He explained that if I had Borden or Bowman's in and I wanted to switch to one of the other dairies I would have to put either one of them out and bring in Dean's for about three months and that after Dean's was in for three months, then I would be an open account and all other dairies could solicit, but during that three months none of the other dairies could touch me excepting the one that I had the original—the one I was originally doing business with.

He said that Dean was one of the only accounts that was open business for any of the dairies to solicit.

I asked him whether or not they would give me a loan in addition to the cash that he told me he might be able to get me and he said that I could not get both at the same time, I would have to take one or the other, but he said they did make loans on an interest-free basis and that he could get a loan for me if I wanted one.

781 He further said that as far as the loan was concerned they would go up to $700 on an icebox or refrigerator and take a chattel mortgage on the box as their collateral security for the same.

He added to that by saying that the company holds a chattel mortgage on the box which would be paid back on my milk bill, which debt would be paid back on my milk bill,

and they held a chattel mortgage until such time as the complete debt was paid back.

He gave me his card and told me he'd call back.

Q. Did he tell you anything about interest on a loan? A. Yes, sir, he told me that the loan would be interest free.

Q. Did he make any statement to you about each company killing each other off on the street? Was anything said with reference to that, do you recall? A. I don't recall that.

782 By Mr. Jinkinson:

Q. That is all you can recall with reference to conversations with Mr. Galnick? A. That is all I can recall with Mr. Galnick.

Q. Did he return again after this conversation? A. No, I had only one conversation with him.

Q. Did you call on any other milk company after you talked to Galnick? A. Yes. The next was on the 23rd day of April, 1950, called in the Western United Dairy, and they sent in a representative.

Q. Who was the representative they sent in? A. I will have to refer to my notes. I don't remember his name.

They sent in a salesman by the name of Al Chernow.

Q. Did he leave a card with you? A. Yes, he left two cards with me.

He gave one card to me, and one to Mr. Olson. Mr. Olson was present at this conversation also.

The Court: Let the notes also be marked.

Mr. Jinkinson: All right.

By Mr. Jinkinson:

Q. I hand you what has been marked as Govern-
783 ment's Exhibits 1160 and 1161, for identification.

Are these the two cards that Mr. Chernow left with you on April 23, 1950? A. Yes, sir, they are.

Q. I note there is some writing appearing on each of the exhibits 1160 and 1161. Is that your writing? A. The initials P.D.N. are my initials. And I put the date on the card, the date that I received it. And the initials W.S.O. were written by Mr. Olson in my presence, and he also wrote the date on the card at the same time I did.

Q. And Government's Exhibit 1162 is what you are using to refresh your memory? A. That is correct.

Q. Notes prepared by you? A. Yes, sir.

Q. What was the conversation between you and Mr.

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Chernow, and you and Mr. Olson, if you recall, with reference to soliciting the milk business at your store? A. I asked Mr. Chernow whether or not he could do business with us. And whether he could deliver milk to our grocery store. He said that having a Dean stop made it much easier to do business with me. He added that Dean was
open business, that anybody could step in and take
784 business from Dean.

I asked him whether or not we might be able to get some money for our stop, and he said we could. He added that the amount I would get would be estimated from the amount of merchandise I had in my store, and not necessarily from the amount of milk business I had done.

I asked him if he knew of any instances where Dean was giving anything to others. He told me that Dean would not give out a penny, where the other outfits would, and he said that is what makes Dean an outlaw outfit. He said they will take everybody's business away from them.

Now, I asked him what terms he could give me with reference to my getting a deal from his company. And he told me that his company offered two angles.

He said the first angle was a gratis service that they gave to me for a certain period of time, that is, he said that everything put in the store except butter would be given free for about a week. He said that the reason butter was not included was because his company churned their own butter, and that they sold it much cheaper than the other
dairies anyhow, and he says for that reason, he says
785 they couldn't afford to give the butter free also.

He also added to this that there was no limit as to the amount of merchandise that I could get. If my store was selling $100 a day merchandise, I would get $100 merchandise free for a week, and if it were selling more or less, it was still a one week gratis basis.

The second angle he offered was what he called a different discount than the usual 3 per cent a month. He said he would give me a much higher discount giving 1 cent on a quart of milk, 2 cents off on a half a gallon of milk, 4 cents off on a gallon of milk, 1 cent off on a half a pint of cream, 1 cent off on a half a pint of whip, 2 cents off on a pint of sour cream, 2 cents off on a pint of cream, and this would all be done for a period of 6 months.

I asked him whether or not I could lower the price of milk which I was selling out of my store as an inducement to promote sales in the neighborhood. He told me that the dairy could not tell a grocer what price to sell the milk for.

He said it was against the Robinson-Patman Act, and the Fair Trade Act.

I asked him whether or not he would give me cash
786 in lieu of the gratis service that he had already told me that they would give, and he told me that definitely they did not make any cash deals, that it had to be one or the other of the two services I already mentioned.

I asked him whether he was the final say on whether or not I would get the deals that he had mentioned, and he told me he was not, but he could make a tentative deal on that day, and it would have to be approved by his office.

But that nine times out of ten the deal that he made was okey. I asked him if he would take a Borden or a Bowman stop—strike that. I asked him if he would take my stop if I had Borden or Bowman's, and he said he would. And I asked him if he would take it if I had signed a contract with him, and he said under those conditions he would not take any stop, that if I had a contract with the company to buy their milk exclusively, he could not take that stop.

I asked him if his company would give me anything else in addition to deals mentioned, and he answered that he would give me the regular 3 per cent a month rebate on the the milk that they were giving all their other customers.

milk that they were giving all their other customers.
787 I then asked him if the one week deal was the best deal he could make with me, and he raised it, and told me he would give me two weeks free service for my business. That is, I wouldn't have to pay for any merchandise excepting butter for a period of two weeks.

I asked him if I could make a loan from his company and he said that his company shied away from making loans, but would get me an ice box if I wanted one at their discount price by setting me up with their connections.

And he further said that I could get it at credit at any one of the box companies that they might introduce me to.

I then thanked him for coming over and told him that I would call him and let him know at a later date whether or not I wanted to do business with him.

This conversation all took place in the presence of Mr. Olson and myself.

Q. Are you through with this? A. Yes, sir.

Q. Did you have a subsequent conversation or conversations after this with Mr. Kost again, from Hawthorn-Mellody?
788 A. Yes, sir, I did. On the 24th of April, 1950, I called the Hawthorn Dairy and I told

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them that I wanted to see Mr. Kost at my store that evening.

Q. Did he come to the store? A. Yes, he did.

Q. Were you there alone or was someone with you? A. I was there, and Mr. Olson was there, and Mr. Kost brought his young son, had his young son with him, a boy by the name of Jerry.

Q. Did you have a conversation with reference to the sale of milk by Hawthorn-Mellody to your store? A. I did. I told him at that time that I didn't think I would be able to do business with him, because I didn't think that I was going to remain at this location and keep this store.

I told him the reason for that was that I was trying to get a three-year lease with a two-year option from the landlord, and that the landlord wouldn't give me the lease I wanted, so therefore I didn't think I was going to keep the store.

Q. Did you return the check, or had you returned that before this time? A. I returned the check at this time.

789 Q. Was there anything else said between you and Mr. Kost with reference to the solicitation of your stop? A. Yes, there were several things. May I refer to my notes to refresh my recollection?

Q. Yes.

Let me have that marked.

By Mr. Jinkinson:

Q. You are now refreshing your recollection from Government's Exhibit 1163 for identification, is that right? A. That is correct.

Q. Now, what was the conversation you had with Mr. Kost? What did you say, and what did he say? A. I told Mr. Kost that I was not keeping the business because I couldn't get the type of a lease that I desired.

And he then suggested several stores that were vacant and for sale, and which I might be able to purchase.

He suggested one large store on Wilson Avenue, and said that this store already had Hawthorn milk in it, and that if we took it over he could not give us a deal, but that he could make a cash deal if we got ourselves a vacant store.

790 I asked him whether Hawthorn had any other kind of deals besides the mentioned cash deal, and questioned him concerning possibly getting a penny off or so on each carton of milk that I purchased from him, and he

said that Hawthorn did not give money off on the purchase of each carton of milk, but worked this type of a deal through its vendors.

He said that Hawthorn had a deal also where they gave milk and products free for ten days rather than cash payment.

He said that he had already given one of these deals to one of Dean's stops, and it was a stop he had just recently got.

I gave the $200 check back to Mr. Kost and asked for him to return the contract.

He told me that he didn't have the contract with him, but that he wouldn't give it, that he could not get it back anyhow.

I then asked him if he could give me a note cancelling out the contract, and he said that he could not give me any written note that voids the contract.

He said that the only thing he could do was to return it and to tear it up in my presence. He insisted that
791 he would destroy the contract, and Mr. Olson and myself—Mr. Olson was here at this time also—Mr. Olson and myself agreed that it was all right for him to tear it up.

Now, before agreeing to let him tear it up, I asked him whether or not the contract could be made binding on me in the event he happened to disappear from the picture, or happened to meet up with an accident on his way home, and he told me that the contract didn't mean a thing, because it couldn't be taken to any Judge or Court or lawyer, because Hawthorn was not supposed to accept—because Hawthorn was not supposed to give money, and no one is supposed to accept any money from Hawthorn.

He said that in the last month he had given about 25 or 26 checks out, and does this all day long, and he said that the year before out of 127 stops that he had gotten away from Dean, that 50 of them, on 50 of them he had given out money.

Now, I asked him whether or not if I left this store and purchased another store that was already in operation, if it happened to have Bowman or Borden's milk in it, whether he could come over and take over my business.

He answered that if I could get a store with Bow-
792 man or Borden or Lake Valley, or anyone else, that he could make a deal with me if I switched over to Dean's for 90 days, but he said I would have to switch

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over to Dean's for 90 days before he would make the deal with me.

He further added that if I had the store that already had Hawthorn in it, and if they had made a deal with the previous owner, then the previous owner would have to pro-rate with me the amount of money he had gotten from Hawthorn, and give me the difference of the money, the unused money on the one year contract.

And he says in the event the other owner had not received anything for a period of one year or so, or more, he said that then they would be able to give me some kind of a deal.

I then told Mr. Kost that in the event I remained in business at this store, or went in business in another store, I would contact him and let him know whether or not we would be able to do business with him.

Q. That was the end of your conversation with Mr. Kost? A. That is all.

Q. That is all you can remember about it? A. That is all I can remember about it.

Q. You had one more conversation, didn't you, with another dairy company? A. Yes, sir, I had a conversation with the Hunding Dairy Company.

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The Court: With what?

The Witness: Hunding, H-u-n-d-i-n-g, I believe it is.

By Mr. Jinkinson:

Q. Did you call the offices of the Hunding Dairy Company? A. Yes, I called the Hunding Dairy Company on the 25th day of April, 1950, and they sent a representative over on that date.

Q. Do you know who it was? A. The representative they sent was a Mr. Boysen.

Q. Did he bring a card with him? A. No, he didn't have a card, but he gave me his name, and I wrote his name down and his telephone number on this piece of paper. (Handing document to counsel.)

Q. Was anyone else present in your store when you had the conversation with Mr. Boysen? A. I want the record straight on this. In almost all of the conversations, or I will say in all the conversations that were during the day, before 7 o'clock, this clerk that was working for Soter was in the store waiting on customers, in the front part of the store, so when I say that there was no one else in the store present besides Mr. Boysen and myself,

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I mean in the back ante-room, there was no one else within hearing distance of us to hear what conversation we had with each other.

Q. In other words, there were other people in the store, but no one overhearing this conversation? A. There were other people in the store.

Q. Did Mr. Boysen call on you for the purpose of soliciting your milk business at the store on North Milwaukee? A. That is correct.

Q. 4761 North Milwaukee? A. That is right.

Q. Did you have a conversation with him with reference to the solicitation of milk? A. I did.

Q. And what was the conversation that you had with Mr. Boysen? A. May I refresh my memory with the notes I have here of that?

Mr. Jinkinson: Yes. May I have that identified?

795 By Mr. Jinkinson:

Q. I hand you Government's Exhibit 1164. Is that the note which you made with Mr. Boysen's name and address? A. Yes, sir, it is. I can identify it by my initials, and the date that I placed on it, at a time shortly after I wrote it down.

Q. You refreshed your memory from Government's Exhibit 1165, which are notes prepared by you? A. Yes, sir.

Q. Tell us what the conversation was between you and Mr. Boysen. A. Well, on coming into the store, one of the first things Mr. Boysen asked me after we introduced ourselves to one another was how long I had Dean's in the store.

He said that he asked this because then he illustrated, he said, for instance, if Bowman or Borden were in there, or had been in there for, say, a period of a month or two months before I had put Dean's in, then he wouldn't be able to do any business with me. And that if he did do any business with me then and took my business, even though I had Dean's at that particular time, if he didn't wait a certain period of time, that then either Bowman or Borden would go out and steal one of his stops, so that was the reason he mentioned for asking me how

796 long I had Dean's milk in.

He also said that because of that Hunding wouldn't want to get his fingers burned with the other dairies with whom they were cooperating.

I asked him whether there were any other dairies that weren't in agreement with his dairy, and he said that the

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only one that didn't cooperate was Dean's, and that was why Hunding could take a Dean stop.

797 He then added that if I had Dean's for thirty days, that my stop would be an open stop, and that all the companies could go in there after the stop because, as he—he said, "Dean's doesn't play ball."

I asked him whether or not this was a—what type of an understanding this was.

And he said that all the other companies, excepting Dean, had a thirty-day agreement on taking stops from one another.

I asked him whether it always ran thirty days, and he said—and I asked him whether there was also a ninety-day agreement, and he answered that in some instances they had a thirty-day deal, and in some they had a two-month agreement, and some they had a ninety-day agreement. It depended on the company.

He said that his company was a small one, and therefore they couldn't afford to lose any business, and on that account he never fooled around with any Bowman, Borden, Western United or Capitol's stops, because if he did, they would steal one of his.

798 I asked him whether or not he could give me something in the line of money to induce me to take milk from him.

And he replied that they were not allowed to make any offers, because the federal investigation was on, and that Hunding was indicted when they were caught here in Chicago.

But he added that it didn't mean a thing; that they just had to watch their step.

I asked him what he estimated my stop would be worth, and he asked for my bills, and he told me that he worked it on the point system, giving points for each bottle or quart of milk and each carton of milk that is purchased.

After looking over my bills, he told me that my stop was worth about a hundred and fifty dollars in cash; that he was quite sure that he could get me a hundred and fifty dollars; and besides that, I would get the three percent rebate.

Then he added that he knew he was wrong in estimating that the stop was only worth a hundred and fifty, but, he says, "The money is not there any more since the cut in the price of milk."

799 There had been a drop—there had been a drop in the price of milk at that particular time, to which he called my attention.

I asked him if there was any possible way of getting more, and he told me that he thought he could get me more, but he would have to take it up with Mr. Hunding personally before he could do it.

I asked him whether I would have to sign a contract with his company, like I might with some of the other companies that were giving out cash and boxes and loans.

And he said that his company did not require a contract; that it was all a gentleman's agreement.

I then asked him how the money was given to me, whether it was given to me in cash, or by a check, by a company check.

And he told me that the way his company operated was that he brought in the check, and he would cash it for me at the time that he brought it in, and had me endorse it.

And he said that when he brought the check in Hunding's signature was not on the check.

800 In other words, it was a blank check without Hunding's signature, and that Hunding did not sign the check until after I endorsed it, and he brought it back to Hunding.

And he told me that in that way I couldn't put the check through my bank, and that Hunding would put the checks all through his own bank.

He told me that Hunding's bank was the Continental Bank in the Loop.

He told me that in that way there is no record of the check in the grocer's bank, and nobody could get anything on anyone.

I asked him whether or not I should declare this money I received on my income tax.

And he said to forget all about it, and not pay income tax on the money received.

He said that the check does not go through the bank anyhow, because it is covered up in some other way in the company books.

He said that there was no record of it reaching the grocer, and that Hunding may even destroy the check; that he did not know what Hunding did with it, and that that was an angle that he, that is, Boysen, did not get into.

801 I asked him whether there was any other kind of deal that might be made besides cash.

And he said that the only way that Hunding worked was on the cash basis. He did not give any free merchandise or anything like that, but that he would give electric signs showing Hunding's cheese, or advertising Hunding's cheese and cottage cheese and their milk and cream sign.

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I asked him whether there were any other companies besides the Dean Company who was—who would not cooperate.

And he said that in addition to the Dean Company—that in addition to the Dean Company that Wanzer Company was another company that all the other companies were after.

But he explained it that Wanzer was a south side outfit, and the reason he knew about it was because quite a bit of Capitol—I mean, Hunding's business was on the south side.

And he said he didn't know whether or not they were doing it to Wanzer on the north side. But he said that definitely they would steal both Dean's stops and Wanzer's stops in the city of Chicago.

802 I then told him that I would expect to hear from him as to whether or not he could get me a better deal than a hundred and fifty dollars that he had offered.

And he said that he would call me back that afternoon.

I asked him before he left whether or not they—his company gave out any loans in addition to paying out the cash money.

He said that they gave loans for ice boxes, without interest, and did have an arrangement where they could let the grocer pay back on his milk bill.

But he added to that that if a loan was made he couldn't make any cash deal—I mean, giving the money cash—in cash without any strings attached.

By Mr. Jinkinson:

Q. Is that the sum and substance of your conversation with Mr. Boysen? A. That is the sum and substance of the conversation.

Q. Did he call you back that afternoon? A. He called me back that afternoon, and I wasn't in. A clerk

803 there that was working for Mr. Soter answered the call, and left a message for me, and I called back, and I wasn't able to reach him, so I let him go. I never went after him.

Q. You never heard from him? A. I never heard from him.

Q. Mr. Newey, what name did you take when you were at the store at 47— A. I had used "Paul Mutzi."

Q. Are you still working for Mr. McConnell now? A. No, sir, I am not.

Q. How long is it since you have been employed by him? A. I left his employ in the summer of 1950 and

have not been employed with him since. It was around August of 1950. I don't remember the exact date.

Q. Did you receive any remuneration from him?

(There was no response.)

The Court: I am going to recess at this time.

Have you finished with those notes?

Mr. Jinkinson: Yes.

The Witness: Yes.

804 The Court: You can give it to them.

As previously announced, there will be no session this afternoon. So we will recess until 10:30 Monday morning.

* * * * *

808 PAUL D. NEWEY resumed the stand as a witness called by the Government, having been previously duly sworn, was examined and testified further as follows:

Direct Examination by Mr. Jinkinson (Continued):

Q. Mr. Newey, you are the same man who testified here on Friday? A. Yes, sir.

Q. I believe there was a pending question when we recessed.

809 The question was, did you receive any remuneration from him, meaning Mr. McConnell? A. Yes, I did.

Q. What was that remuneration? A. Four hundred dollars a month.

Q. You haven't worked for him since 1950? A. No, sir.

Q. While you were working for Mr. McConnell, were you working for him as a lawyer? A. Yes, sir, I was.

Q. That was your employment with him as a lawyer? A. That was my understanding, yes, sir.

Mr. Jinkinson: You may cross examine.

Cross Examination by Mr. Ball:

Q. Mr. Newey, where did you get the name Paul Mutsi?

The Court: Will you spell that name for me?

Mr. Ball: M-u-t-s-i, I believe, if the Court please.

The Court: Is that right?

The Witness: Yes, sir.

The Court: Thank you.

810 By the Witness:

A. That was an assumed name that I used myself.

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By Mr. Ball:

Q. Have you used it on other occasions? A. No, sir.

Q. Do you know anybody by the name of Mutsi? A. No, sir, I don't.

Q. How many other aliases have you used in the last three years? A. Will you repeat the question, please?

(Question read.)

By the Witness:

A. I couldn't—I can't answer that.

By Mr. Ball:

Q. A number of them, though? A. I may have.

Q. Have you ever used the alias Schermerhorn? A. No, sir.

Q. Did you ever have cards with that name on it in your possession? A. No, sir.

Q. Or a name similar to that? A. No, sir.

Q. Never had a card with that name on it, knew
811 anybody? A. No, sir.

Q. You had cards with the name Paul Mutsi on, didn't you? A. No, I never did.

Q. Didn't you hand out cards with the name Paul Mutsi to these solicitors? A. Absolutely not.

Q. Now, you did other work on the Dean case for Mr. McConnell other than the tape recordings? A. Yes, sir, I did.

Q. What was that? A. I went through the Municipal Court records to find how many suits had been filed in behalf of the various dairy companies against various plaintiffs—I mean defendants—and I also interviewed some grocers regarding certain information I had concerning their having left Dean and taking other dairies.

Q. This was information given you by Mr. McConnell? A. That is correct.

Q. Why didn't you call on a solicitor from the Meadowmoor Dairy? A. Mr. Soter asked me not to.

Q. Did he give you a reason? A. Yes, sir, he was
812 afraid.

Q. What was he afraid of? A. Well, he told me that Meadowmoor had a reputation of being connected with racketeers and he was afraid that he might meet up with some harm if I called them in.

Q. During your practice of law you had a law suit

against Hawthorn-Mellody, Bowman, Deluxe Ice Cream and some others?

Mr. Jinkinson: That is objected to, your Honor, as outside the scope of the direct examination.

The Court: It goes to the witness' credibility and his motives, however. He may answer.

By Mr. Ball:

Q. Did you? A. Yes, I did.

Q. This was an antitrust case, wasn't it? A. That is correct.

Q. When did this case start? A. I believe that the suit was filed prior to April of 1950.

Q. June 20, 1950, wasn't it? A. It could have
813 been.

Q. And you have been investigating it for some little time prior to that time? A. I have.

Q. Did you discuss this case with Mr. Harsha? A. With Mr. who?

Q. Harsha of the Antitrust Division.

The Court: By this case now, you mean the one he filed?

Mr. Ball: The Azou case.

By the Witness:

A. I discussed the case with Mr. Hotchkiss.

By Mr. Ball:

Q. Did they recommend you see Mr. McConnell? A. They told me that Mr. McConnell had a similar suit, but they didn't tell me to see him.

Q. Who suggested that you ask Mr. McConnell for work? A. Nobody suggested I ask Mr. McConnell for work.

Q. How did you happen to go to work for him? A. I went to see Mr. McConnell when I was conducting the investigation on this other antitrust suit on my own, and I went to see him to see whether or not there was any way
that he might be able to assist me in my suit, that is,
814 with reference to whatever information he had or witnesses that he might have had in his case.

During my conversation with Mr. McConnell, it came up that I had previously worked for the Government as an investigator with the Treasury Department and at the end of my conference with him he asked me if I would like to go to work for him.

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815 By Mr. Ball:

Q. Did he give you any help in your Azou case? A. No, he didn't.

Q. He showed you the pleadings in his case, didn't he? A. I saw the pleadings in his case, but they weren't shown to me on the basis that they were to give me any help in the Azou case.

Q. And you used those pleadings as the basis of your pleadings in the Azou case? A. I used many pleadings as the basis of assistance.

Q. Including those? A. Including those, and many others.

Q. During the time that you were working for McConnell, did you work for anybody else? A. Well, I was practicing law as a lawyer. I was representing other clients, if that is what you mean.

Q. At that time, were you working for the Government at that time? A. No, I was not.

Q. Not being paid anything by the Government? A. No, sir.

Q. How much did you settle that antitrust case for? A. I don't recall.

Q. How long did McConnell employ you? A. A
816 period of about 6 months.

Q. It was about $750 that you got for that antitrust case of yours, wasn't it? A. It could have been. It was around that figure, yes, sir.

Q. Now, who is paying for your time while you are testifying in this case?

Mr. Jinkinson: Your Honor, that is objected to.

The Court: Sustained.

By Mr. Ball:

Q. Are you getting any money at the present moment from anybody else but your present employer? A. I didn't say I had a present employer.

Mr. Ball: Read the question, and I ask that the witness answer the question.

(The question was read.)

By the Witness:

A. The answer is No.

By Mr. Ball:

Q. Now, you testified that you conferred with Mr. McConnell, and that McConnell told you what facts they were attempting to establish.

Now, one fact that Mr. McConnell told you they
817 were attempting to establish was that there was an agreement between the dairies not to solicit each other's business, is that right? A. That is correct.

Q. Another fact that he told you that they wanted to establish was that Dean was being attacked by the other dairies, isn't that right? A. Well, that depends on what you mean by the word "attacked".

Q. Well, you discussed the situation of the other dairies going after Dean customers, didn't you? A. That is correct.

Q. And you were attempting to show that this was a plan on the part of the defendants to go after Dean customers? A. Yes, sir.

Q. Now, Mr. McConnell told you, didn't he, that he was attempting to show that the other dairies claimed that Dean wouldn't play ball with them? A. I don't believe he used those terms, no.

Q. Well, he said that they wouldn't cooperate with them, isn't that right? A. That is correct.

Q. And he used the word "cooperate"? A. Mr.
818 McConnell?

Q. Yes. A. I don't recall.

Q. Mr. McConnell told you that some of these dairies were indicted, didn't he? A. I believe he did, yes.

Q. And he told you who were indicted? A. I don't know whether he did or he didn't.

Q. McConnell also told you there was an association of dairies called the Chicago Milk Association, didn't he? A. He may have told me that.

Q. And he told you the real name was the Associated Milk Dealers? A. I don't recall his telling me that, no, sir.

Q. But you discussed the Association? A. We discussed a lot of things.

Q. He also told you that Borden had gotten out of the Associated Milk Dealers Association some time previously, in 1947, didn't he? A. He didn't tell me that.

Q. Well, you found that out, didn't you? A. I don't recall whether I did or I didn't.

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Q. How long does it to to fill one full tape? A. A
819 1200 foot tape using a machine that operates at about 3¾ inches per second will last slightly over an hour.

Q. How long with the conversation with Kost, the first conversation with Kost, last? A. I would say it was close to a half an hour, maybe a little bit more.

Q. How long did the second conversation with Kost take? A. I would say that was close to three-quarters of an hour.

Q. How long did the last conversation take up? A. I believe it was over thirty minutes.

Q. How long did the conversation with Mills take place? A. The first conversation, close to an half an hour. I can say this specifically, that some of them were over an hour.

Q. Now, this tape could be turned on and off, couldn't it? A. Yes, sir.

Q. Have these tapes been in your possession ever since? A. No, they haven't.

820 Q. You turned the tapes over to Mr. Golding? A. I turned the tapes over to Mr. McConnell.

Q. Did Mr. Olson have any of these tapes in his possession? A. No, he didn't.

Q. When, do you know, were these tapes transcribed? A. When did I know that they were transcribed?

Q. Did you know when these tapes were transcribed? A. They were transcribed in my presence several weeks, about two or three weeks after they had been taken.

821 Q. But you helped Mr. Golding at that time, when there was a transcription being made? A. I played the machine at Mr. Golding's—and Mr. Golding's assistant transcribed it.

Q. And you corrected any errors or explained any words that were not clear? A. That is right.

Q. Now, you did not take down everything that was said? A. We took down everything that was said, yes, sir.

Mr. Ball: Let me have the transcript, Exhibit 1153, please.

(Mr. Jinkinson handed a document to Mr. Ball.)

By Mr. Ball:

Q. I hand you Government's Exhibit No. 1153 for identification, and ask you if that starts with the beginning of your conversation with Mr. Kost? A. Yes, sir, this starts from the very beginning.

Q. You saw Mr. Kost outside, asked him to come to the back room? A. I saw him come into the store, and I
822 waved to him—called him toward the rear.

Q. That is the first word that was said? A. Yes, sir, this is the first word that was said; he started the conversation.

Q. Who changed the tapes between? A. I did.

Q. Now, this store that you had was in the middle of the block, wasn't it? A. It wasn't on the corner, but I wouldn't say it was in the middle of the block. I didn't measure to see.

Q. Well, there was a Royal Blue Store, which was closed down, on one side, wasn't there? A. Yes, sir.

Q. And there was an empty radio store on the other side? A. Now, just a minute. There was—when you say "on one side"—

Q. Adjoining. A. Do you mean adjacent or adjoining the store?

Q. Yes, sir. A. No. The Royal Blue Store was a few doors down.

Q. On the same side of the street? A. On the
823 same side of the street.

Q. In the same block? A. In the same block.

Q. There was an empty store on one side of you? A. I don't believe it was empty, no.

Q. But your present recollection is there wasn't any empty store? A. My recollection is that there was a radio store next door, but I don't recall whether it was empty or whether there was someone in there; that I don't recall.

Q. What was on the other side? A. On the other side? I don't remember what was on the other side.

Q. Under what trade name was this store operated? A. Peter Pan Grocery.

Q. Who suggested the use of this particular store for this purpose? A. I suggested the use of a store, and subsequently a store was offered to me by one of the solicitors, who was working for Mr. Dean.

Q. And you visited with him where? A. I visited with him the first time at the Dean Milk Company on West North Avenue.

824 Q. And who was present? A. There wasn't anyone else present; just he and I.

Q. How much was paid for the use of his store? A. I wasn't paid anything that I know of. I mean, I didn't pay him anything.

Q. What did you tell Soter? A. Well, there were many

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conversations with Soter. I mean, you are going to have to ask me which conversation.

Q. All right.

At the time that you first saw him at the Dean office. A. At the time I saw Mr. Soter, the first time I saw him was at the Dean office.

I asked him what information he had with reference to the solicitation of Dean's business by some of the other dairies.

He told me they had been losing many of their customers because the other dairies were buying the businesses from Dean, or buying businesses by paying the grocers cash, that is.

And so I asked him to furnish me with the name and addresses of some of the grocers whom he thought
825 might cooperate in giving evidence to the effect that they had been paid to do business with someone other than Dean.

Now, that was about the substance of my first conversation with Mr. Soter.

Q. Did he suggest to you the use of this store? A. No, he did not.

Q. Was there a Dean sign in the window of this store? A. I don't remember that.

Q. Who was Willard Olson? A. He is an attorney here in Chicago.

Q. Who suggested that he be employed by McConnell? A. I did.

Q. How long had you known him previously? A. I had known Mr. Olson since 1936.

Q. Did he operate this tape recorder? A. He didn't.

Q. Did he ever have possession of the tapes? A. He did not.

Q. Was the tape machine recorder any place else at any time when he was in the store and you were not? A. No, it wasn't.

826 Q. He was in the store when the tape machine was there, wasn't he? A. And I was there with him.

Q. Did you take the machine out every night? A. I did.

Q. He was in the store on the occasions when you were not there? A. No, he wasn't.

Q. Do you know his present whereabouts? A. Yes, I do.

Q. Have you discussed your testimony in this case with him? A. No, I have not.

Well, now wait a minute.

I have not discussed my testimony, but he knows I am here testifying, as do perhaps several million people in the City of Chicago. It was published in the newspaper.

Q. Well, you gave your name as Mutzi to each of these dealers, and that wasn't your name? A. That is right.

Q. You told each representative of these dairies that you were the owner of the store, didn't you? A. Yes, I did.

827 Q. And that was not true? A. That is correct.

Q. You told each of these men that you were dissatisfied with Dean's milk or service, didn't you? A. I did.

Q. And that wasn't the truth? A. No.

Q. You told these various people that you might buy their milk, is that right? A. That is right.

Q. And that wasn't true? You had no intention to do it? A. That is right.

Q. You told each man that you were considering enlarging your store and taking over adjoining space? A. That is correct.

Q. And that wasn't true? A. No, it wasn't.

Q. You told Kost that you had a cousin who owned a part of the store, didn't you? A. Yes, I did.

Q. And that wasn't true, was it? A. No, it wasn't.

828 Q. You told Kost you tried to get a three-year lease with a two-year option from the landlord? A. That is correct.

Q. And that wasn't true, was it? A. No, it wasn't.

829 Q. Now, what about these notes which have been identified here which you used to refresh your recollection? When were those notes made? A. They were made on Thursday of this last week. The day before I appeared in Court.

Q. The day before you appeared in Court? A. Yes, sir.

Q. Are they all in your handwriting? A. Yes, they are.

Q. You have no independent recollections of what was said in these conversations, have you? A. I have some independent recollection, but not too much.

Q. Well, describe Mr. Kost? A. I would say Mr. Kost was a man of about 45 years of age, about five feet eight inches in height.

Q. Did he wear a mustache? A. No, not at that time. He may be wearing a mustache now, I don't know. I haven't seen him since 1950. I would say he weighed 160 pounds, 150 to 160 pounds.

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Q. Describe Mr. Mills? A. Mr. Mills was—I would say he was about five foot eleven to six feet tall and I
830 would say he was close to 200 pounds, light complexion, sandy. I would not say he was blonde, just light hair.

Q. Describe Mr. Galnick? A. Mr. Galnick was about five feet eleven inches tall. I would say he weighed about 175 to 180 pounds, dark complexion, brown eyes, black hair or brown hair, and he didn't speak too distinctly, kind of ran his words one into the other.

Q. Describe Mr. Boysen? A. Mr. Boysen was—I will correct my description on Mr. Kost. I think he was closer to five foot nine or five foot ten in height.

Mr. Boysen, I would say he was about five feet six inches tall. He was stocky built. I would say he weighed about 180 pounds. He had a foreign accent; I would say it was either—it was a mixture of either Scandinavian or Germanic accent.

Q. Describe Mr. Chernow? A. Mr. Chernow was, I would say, about five feet six or seven inches tall and weighed about 145 pounds. He had a medium build. His complexion was fair, I would say. That is about the best I can describe him.

Q. Are any of those men in the room today?

Mr. Jinkinson: Your Honor, I object to that ques-
831 tion as improper.

The Court: Overruled. He may answer, unless they are behind the screen there where he can't see them. He can't see the people at the end bench over there.

The Witness: I don't recognize any of them in this room today, no, sir.

By Mr. Ball:

Stand up, Mr. Mills.

Q. Do you recognize Mr. Mills now? A. Now I do, yes, sir.

Q. You made these notes from reading the transcript, did you not? A. Yes, I did.

Q. You made these notes at home? A. No, I made most of the notes here on the fourth floor.

Q. Who asked you to read these transcripts?

Mr. Jinkinson: Your Honor, I object to that question as improper.

The Court: Overruled.

By the Witness:

Q. I read the transcripts to prepare for the case.

By Mr. Ball:

Q. Yes, but who asked you to do that? A. Well,
832 nobody asked me to do it.

Q. What conversation did you have with Mr. McConnell about it? A. Mr. McConnell told me that I could have the transcript and the tapes to support me in anything I might be asked to testify to, and he gave me a letter to that effect. I have a copy of that letter in my pocket.

Q. Did you ask him for the transcripts? A. I had called him asking for the transcripts several times, yes.

Q. What date did Mr. McConnell write you? A. May I refresh my memory with the letter?

Q. Yes. A. The letter is dated March 18, 1953.

Q. Now, going over these transcripts you picked out the points that you thought would help out the Government's case, didn't you? A. Would you repeat that question, please?

(Question read.)

By the Witness:

A. That is right.

By Mr. Ball:

Q. How long did it take you to make these notes?
833 A. It took me about four or five hours. I am not certain.

Q. Then did you discuss these notes with Mr. McConnell after you made them? A. No, I didn't.

Q. Did you discuss them with Mr. Jinkinson? A. No, I didn't.

Q. Did you discuss them with anybody in the Antitrust Division? A. I told them I had made some notes, but I didn't go over the notes with them, no, sir.

Q. Did you show anybody the transcripts? A. Yes, I have.

Q. Who did you show them to? A. I have shown them to Mr. Jinkinson here. I showed them to Mr. Faris.

Q. Now, you have all the rest of the transcripts with you today? A. They are not with me, no, sir.

Q. You had them with you Friday? A. I did.

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Q. Now, you numbered your notes in sequence, did you not? A. Yes, sir.

834 Q. No. 2 is missing. What did it cover? A. No. 2 covered the conversation between Mr. Olson, Mr. Kost and myself.

Q. The second visit? A. On the 19th of April, 1950.

Q. That was the second visit to Mr. Kost? A. That is correct.

Q. The one you said lasted three-quarters of an hour? A. I would say it lasted close to that. Maybe a little less.

Q. Now, Kost told you that 67 dairies had been indicted, didn't he? A. No, I don't remember him saying that.

Q. Handing you again Government Exhibit 1153, page 10, I call your attention to that page and ask you if that refreshes your recollection as to what Mr. Kost said to you? A. That is an error. That was six or seven, as I recall it, not 67 dairies.

Q. But you played this record and listened to the Golding transcript when it was made? A. That is correct.

Q. You didn't correct it at that time, did you? A. No, I didn't.

835 Q. As a matter of fact, you are the first one that mentioned indictment in that conversation? A. I don't believe I did and—

Q. I hand you again Government Exhibit 1153 and call your attention to page 10 and ask you if you were the first to use the word indictment in that conversation? A. I mentioned the word indictment—

Q. Just a moment, answer the question.

Mr. Ball: Read the question.

The Court: Read the question back.

(Question read.)

The Court: What is your answer?

By the Witness:

A. I mentioned the word indictment after Mr. Kost had indicated that the other dairies were up to—and he motioned with his hand, meaning their neck in trouble.

836 By Mr. Ball:

Q. But the first use of the word "indictment" is where you said to him, "Where is that indictment?"? A. That is right.

Q. Now, Mr. Mills told you, you have testified, that Wanzer and Dean were under indictment as well as Borden, isn't that right? A. That is right.

Q. And you knew at the time that was not true, didn't you? A. That is right.

Q. Now, Kost told you that Western United and Capitol were for sale, and that you shouldn't buy milk from them, is that true, didn't he? A. That is correct.

Q. And you knew that was not true, didn't you? A. I didn't know that was not true.

Q. Well, you had every reason to believe that in your discussion with Mr. McConnell, that that was not true? A. I didn't know that.

Mr. Jinkinson: That is objected to.

The Court: He may answer if he knows.

By the Witness:

A. I didn't know that, no, sir.

837 Mr. Ball: May I have No. 1165?

By Mr. Ball:

Q. Now, you testified, Mr. Newey, that "one of the first things Mr. Boysen asked me after we introduced ourselves to one another was how long I had Dean's in the store."

Page 2285.

"He said that he asked this because, then he illustrated, he said, for instance, if Bowman or Borden were in there, or had been in there for say a period, or a month or two months before I had put Dean's in, then he wouldn't be able to do any business with me."

Now I ask you, I hand you first Government's Exhibit No. 1165, and ask you what there is in those notes of yours that recall to you that you said that he wouldn't be able to do business with you? A. At this point to here, I have got a notation here that Mr. Boysen asked how long Dean was in my store, "in this stop" I have got it here.

Q. All right, go ahead. A. Which means in the store.

Q. What else? A. And that he said that he asked
838 this because if, for instance, Borden or Bowman, or Bowman or Borden were in here for a month or two months, and I switched to Dean, then they would go out and take or steal one of Hunding's stops.

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Q. All right, go ahead. Read the next sentence. A. And Hunding wouldn't want to get his fingers burned.

Q. That is all right. And you have no recollection beyond what is in that note, have you? A. Oh, yes, I have, sure. Sometimes I have one word which may recall many things to my mind.

Q. Now, you testified that "Mr. Kost told me it was fortunate for me that I had Dean's milk in the store there, because he wouldn't be able to do business with me otherwise." A. That is correct.

Q. Now, I will hand you Government's Exhibits 1153 and 1154, and I ask you if you will find in either of those exhibits any instance, either in the transcript or in your notes of the use of the word "fortunate" or the use of the word "able" by Mr. Kost? A. I was asked to testify as to the substance, not the exact wording.

Q. Oh. Mr. Kost didn't say that you were fortunate
839 to have the Dean milk? A. I don't know. Perhaps he did, but if I used the word "fortunate" and the word "fortunate" isn't in here, it was because the Court instructed me to testify as to what the substance of my conversation was, and that is what I testified to.

Q. All right, now, I ask you if you will look in those two exhibits, and see if you can find either the words "fortunate" or "able" used by Mr. Kost? A. This is going to take me a little while.

Q. You testified, did you not, that that occurred at the beginning of the conversation? A. That what occurred at the beginning of the conversation?

Q. That remark of Mr. Kost's. A. I don't believe I did.

Q. Go ahead. A. Do you have it there in the transcript?

Q. You check up on the words "fortunate" and "able." A. Here is one place where he used the word "fortunate". Of course, it was not in that respect, but you asked if there was anywhere here that he used the word "fortunate".

Q. How did he use it? A. I asked him, "Are you
840 mixed up in this?", talking about the indictment. And he said, "No, we have been fortunate."

Q. That is right. A. "We have been very fortunate. I mean, we haven't, but there is six, 67 dairies that are. I mean, as I say, we are in a little, but we don't have to worry. In fact, I know we are clear of it."

Q. That is right. All right, go ahead. Is there any other place you find the word "fortunate"?

841 Q. Or the word "able."

The Court: The word what?

Mr. Ball: Able, a-b-l-e.

Mr. Jinkinson: Well, now counsel wants him to find two words or one word?

Mr. Ball: I am asking him for two words.

By the Witness:

A. I did not hear the word "able" before. I am going to have to start all over.

By Mr. Ball:

Q. All right. Check the word "able" again. A. I will check the word "able."

The Court: Have you gone through it? Is it in there?

Mr. Ball: It is not in there.

The Court: It is not in there?

All right, I will accept your statement.

If you find that it is not in there, you may tell me later. I am not going to sit here all day.

Mr. Jinkinson: I will do so, your Honor. I will do so.

By Mr. Ball:

842 Q. Now, you testified as follows:

"Q. Did he name the dairies whose stops could not be taken? A. Yes, he named several dairies.

"Q. And what dairies did he name? A. He named Wieland.

"He named Bowman, and he named some others. I would have to refresh my memory again.

"Q. Will you do so? A. He named Western United.

"He named Borden.

"And he named Beloit."

And you also testified:

"I asked him whether he could take a Borden stop.

"He told me he could.

"I asked him whether he could take a Western United stop."

"He said he couldn't.

"I asked him whether he could not take a Western stop.

"He said he couldn't."

Now, I will hand you your notes of the conversation
843 with Mr. Kost, Government's Exhibit No. 1154, and ask you to point out to me what passage there refreshed your recollection that Mr. Kost said that there were named these dairies whose stops could not be taken.

Mr. Jinkinson: I object to that, your Honor, as not being proper in form.

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If counsel wants to introduce the witness to his previous testimony, he should show it to him.

The Court: You should show it to him.

Mr. Ball: I will do that.

By Mr. Ball:

Q. The first page is page 2238, and the second is on 2243. A. The first answer that I made:

"And he told me that Dean was one of the companies—" That is on page 2238.

Q. Yes. A.

"—that did not cooperate with others, and therefore he was open for business for all the other companies."

844 Q. No. That is not the passage I read you. A. That (indicating)?

Q. I read you the passage beginning with the question: "Did he name the dairies whose stops could not be taken?"

And asked you where you find in your notes, as they have refreshed your recollection, as to such answers by Mr. Kost. A. The passage that represents—that refreshes my memory with reference to my answer to that question—

Q. Yes. A. —is this short notation here:

"that Borden and Western cooperate; also Bowman cooperates."

Q. All right.

Now, did Mr. Kost use the word "cooperate"? A. He may have used the word "cooperate" or a synonym. I don't remember.

Q. As a matter of fact, you used the word "cooperate"? You put it in his mouth, didn't you? A. Maybe I did. Maybe I gave a word to use—

845 Q. Yes. A. —where he might have used another one. I don't know.

Q. I call your attention to page 5 of Government's Exhibit No. 1153 and I ask you to read the sentences beginning with the seventh line from the bottom of the page. A. Now just a minute.

This does not start with the word "cooperate."

Q. All right.

Read that part. A. Let me find where the word "cooperate" is first used.

Q. All right. You hunt for it. A. All right, I will hunt for it.

(The witness referred to a document.)

In reply to a question by me, asking him:
"Why is that?"
Mr. Kost said:

"It is one of those things. I mean Dean is the only guy who don't play ball with anybody."

846 And then I used the word "cooperate," but "not playing ball" to me is synonymous with cooperate.

Q. But you put the word "cooperate" in, didn't you? A. I may have been the first one to use the word "cooperate."

Q. As a matter of fact, there is not any place in here, in that transcript, where Mr. Kost said that he could not take United—Western United, or these—or Wieland, or Borden or Bowman stops, is there? A. I think there is, yes.

There are many places in there that indicate that.

Q. That is your opinion and conclusion, isn't it? A. No, it is not.

Q. Well, you turn to your notes? A. There are no conclusions on my part. Those are facts.

Q. You turned—I asked you if your memory was refreshed as to that statement, that he said he could not take these stops, and you turned to the phrase:

847 " —because Dean didn't play ball and don't cooperate." Isn't that right? A. That is right.

Q. Is there any place else in these notes where there is anything that refreshed your memory? A. It said: "Borden, Western cooperate, also Bowman cooperates."

Q. That is all that was said, and you asked him about that, didn't you, whether they cooperated or not? A. I asked him whether or not he could take one of their stops.

And he said, "No."

Q. All right.

Find that in the transcript for me. I did not see it, as a matter of fact.

Mr. Tierney: If the Court please—

By the Witness:

A. Mr. Kost said:

"All right. If I can't, I am going to tell you I can't. And if I can't, there must be a reason why I can't.

"So I mean, we are all—we all try to get as much
848 business as I can possibly get, but sometimes there is a situation that we can't. I don't know.

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"I mean, that I will come in the office this afternoon, and he old man, the boss, will say, 'Go out and take a Bowman top,' or 'Go out and take a Capitol stop,' or 'Borden stop' r something like that.

"Well, if that happens, then they must have taken one way from us."

By Mr. Ball:

Q. And that is the passage—

The Court: Just a minute.

Mr. Tierney: I wonder if we might have a short recess, our Honor?

The Court: Is it agreeable to the examining counsel?

Mr. Ball: If it is agreeable to the court, it is agreeable o me.

The Court: Very well. Take a ten-minute recess.

(A short recess was taken.)

349 The Court: You may proceed.

By Mr. Ball:

Q. Mr. Newey, Mr. Mills told you, didn't he, that he was ust starting out as a solicitor for Borden? A. I don't emember him telling me that, no, sir. He told me he was going to school at night.

Q. At Borden? A. At Borden's, yes, but he didn't say e just started out as a solicitor, no.

Q. When Mills came to the store he didn't ask you how ong Dean had been serving you, did he? A. I don't think e did, no.

Q. You had another conversation with Mills after the wo of you testified to, didn't you? A. No, just two conversations with Mr. Mills.

Q. You telephoned Mr. Mills the day afterwards, didn't ou? A. I don't recall telephoning him the day afterwards, no.

Q. You have no recollection of that? A. No, sir.

Q. Would you say you didn't? A. I don't think I did.

Q. Now, you testified that Mills told you that Dean 350 did not cooperate with any of the other dairies. That is on page 2255 of the record. A. Yes, sir, I said hat.

Q. And that statement I take it, took place according to your testimony at the beginning of your conversation with Mr. Mills? A. I don't remember what part of the conversation it took place in, but I know it was said.

Q. Well, again, isn't it a fact that Mr. Mills didn't use the word "cooperate," and that it was your word? A. I believe we were talking about Mr. Kost when you asked me who used the word "cooperate" first. I don't recall whether I used it first or he used it first.

Q. You don't recall whether you used it or Mills used it in your conversation with Mills? A. I don't recall who used it first, but it was used by Mr. Mills.

Q. If you will turn to page 2261 of the transcript you testified, did you not, that Mills told you he had been called in with some of the other company salesmen by the Government? A. 2261?

851 Q. Yes. A. Yes, sir, he said that.

Q. Now, I hand you Government Exhibit 1156 and ask you where you find in that anything that refreshes your recollection that he said he had been called there?

It is a fact—we will shorten it up. Your notes on the second page, Mr. Newey, say only that he told you that the Government had called the contact men in like Mills, and cautioned them, isn't that right? A. Yes, but he added to that. I mean, that is what recalls it to my memory. He added he had been called in himself and told.

Q. But you didn't put that in your notes, did you? A. There are a lot of things I didn't put in my notes verbatim. My notes were just made to refresh my memory.

Q. Now, if you turn to page 2262 of the record, you will find that you testified, did you not, that "I asked him about Belmont Dairy and whether or not Belmont was connected with his company, that is, Borden, and he said that it was and told me he was quite surprised because very few people knew that."

Is there anything in your notes that refresh your
852 mind that he was surprised? Your notes merely state, do they not, Mr. Newey, "If I took Belmont, Belmont and Borden would both come in. There is a connection between the two." A. That is right, and that refreshed my memory as to the other conversation.

Q. Now, you testified on record 2262, "I then asked him whether or not Belmont was giving any cash allowances to grocers to get the business. He told me they were."

Is that your testimony? A. Yes, that is right.

Q. Mills didn't tell you that, did he? A. Yes, he did. He told me they would make a cash deal with me.

Q. Turn to your notes, 1156, and I ask you if your notes say, "Belmont will pay cash (by inference)"? Isn't that your note? A. That is right.

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Q. In other words, you were putting an interpretation on what he said? A. No, sir, I wasn't; no, sir.

Q. Now, turn to record 2265.

You testified that "He told me he had called Bel-
853 mont and that Belmont had asked him who I was, where I was located, and what I wanted, and he further explained that after giving them the details of who I was, where I was located and what I wanted, that Belmont said they didn't want to do any business with me."

Now, turning to your notes I ask you if the only passage in them that covers that situation— A. Those are the wrong notes. It is the other set.

Q. 1157—and that the only passage in your notes reads as follows:

"Mills said his boss called Belmont, Belmont refused to give the cash money." A. That is right. That refreshed my memory as to the rest.

Q. Now, you testified on record 2261, if you will turn there, that Mills told you that in order to get a case from the Borden Company, that is a showcase or a display case or a refrigerator, that you would have to sign a contract with them to do business for one year.

Is that your testimony? A. That is right. That is what he said.

854 By Mr. Ball:

Q. Now, I ask you if there is any passage in your notes—1156—other than this:

"In order to buy grocery case Borden gives him the money, and then in return he signs a statement to buy their milk and pay that $1.00 a day on the milk bill." A. That is right. And that refreshes my memory.

Q. Now, if you will turn to record, Page 2244, going back to the testimony of Mr. Kost, you testified, did you not, that there was no way in the world—that he said, "that there was no way in the world that he could take that stop, because there was an agreement between his company and their company whereby he could not take the stop."

Now, as a matter of fact, he never told you there was an agreement between the companies, did he? A. This was in reference to m first conversation with Mr. Kost?

Q. Your first conversation. And just after you had refreshed your recollection by looking at this transcript, wasn't it? A. Yes, sir.

Q. And there is not any reference on that transcript
855 where he said that he had said that his company had an agreement with anybody, except what you may have put your own interpretation on? A. Let me see.

(Witness refers to document.)

Mr. Ball: I think I can shorten this.

The Court: Very well.

Mr. Ball: Well, you go ahead and see if you can find it. It is hard to prove the negative, if the Court please.

The Court: Very well.

By the Witness:

A. On Page 20 here, when I was talking to Mr. Kost about Bowman and Borden, getting something from Bowman and Borden, I said "I don't think I could get anywhere, I mean, comparably, by calling Bowman in or Borden, and some of the others."

And he says, Mr. Kost said, "Bowman's, Borden's, I will be frank with you, if they spent a dime and they found they let their stops go, you would be surprised how many stops they have lost, they have lost a hundred stops because—"

Then I said, "But they still have a few, you know. Of course, they have been doing something."

And he said, "They have been in business for 75
856 years. We have only been in business for 10 years, and we are the third largest dairy. I mean, if we stay in business another 10 years, and if we keep on going the way we are going, we would be the largest.

"Take Borden and Bowman stops, you drive along with me any time that you are free to go along with me, and I will show you that, I can prove it to you that I can take 10 stops today from them. I don't know for how long, but I could."

By that he inferred that he was not taking their stops. There was some kind of a mutual understanding between them whereby he was not taking their stops.

By Mr. Ball:

Q. That is the basis of your testimony? A. Well, I am not through with that yet. I have only gotten to that page.

Q. All right. (Handing document to witness.)

You find no other passage? A. I don't find the word "agreement", no.

Q. Now, I call your attention to your testimony at Page 2238 of the record.

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In response to a question, "Did he (Kost) name the dairies whose stops could not be taken?"

857 You answered, did you not, "He named Weiland, he named Bowman, he named Western United, he named Borden's, and he named Beloit."? A. Yes, sir.

Q. Now, where in your notes, Exhibits 1154—Exhibit 1154, do you find any reference to Beloit? A. On Page 3, where Mr. Kost had told me that Beloit had given John of John's Restaurant on Western Avenue, just across from Riverview, $50, and a $300 loan ten years ago.

Q. Is that what recalls to your mind that Mr. Kost said that he couldn't take Beloit stops? A. That is right.

Q. Now, as a matter of fact, that particular instance you have was Kost telling you about a stop he actually took from Beloit, wasn't it? A. I don't recall. I will have to refresh my memory.

Q. All right. Isn't it true that according to the transcript, 1153, Mr. Kost told you, "I got a place up on Western Avenue right across from River Park, John's. He opened his restaurant just yesterday. I serve his son at 521 Damen Avenue, and his son wouldn't have anybody else but us in there. I have done George a lot of favors, and the

858 father, as I say, I have been trying to get his business for two or three years, and he has Beloit.

"Beloit loaned him 10 years ago $300. They gave him $50 and a $300 loan, and he has never, regardless of what you would offer him, it doesn't mean anything, he still thinks Beloit is the only company on the street."

Isn't that what Mr. Kost said to you? A. That is right.

Q. Now, as a matter of fact, didn't Kost also tell you specifically he had been soliciting Bowman stops? A. No, he didn't.

Q. All right. I will turn to transcript again— A. Let me call counsel's attention to this. When you refer to just a question and an answer, there was much that went on before, and much that went on afterwards.

And from the question and answer that you might pick out, you don't get the overall picture of what the conversation was, during this complete conversation which took over half an hour.

Mr. Ball: I move to strike out the answer as not responsive, and as argumentative.

859 The Court: It may be stricken.

By Mr. Ball:

Q. Now, I call your attention to Page 27, especially at the bottom of the page beginning with the remark that Mr. Kost made:

"Your deal here, he has got Bowman's, he has had Bowman's all of the time for many, many years."

And then at the bottom of the page Mr. Kost went on to explain:

"He is an old gent there. In fact, I tried to get his stop, and he says there is no sense wasting my time, or me wasting your time. He says I am going to have Bowman's in here regardless of what you offer me, or what you are going to do."

Mr. Kost said that to you, didn't he?

It is in the transcript, isn't it, Mr. Newey? A. Yes.

Q. All right. Now, you omitted— A. Now, just a minute—

Q. You omitted to tell us— A. I haven't answered the question yet.

860 Q. I said, that remark is in the transcript, isn't it?

The Court: You answered it.

The Witness: Well, there is some other remarks in the transcript, too.

The Court: Government counsel are able to argue their own case. You won't have to do it.

The Witness: All right.

By Mr. Ball:

Q. You omitted to tell us, didn't you, that Kost denied to you that the defendants in this case played ball with each other? A. Will you repeat the question?

Mr. Ball: Read it.

(The question was read.)

By the Witness:

A. I don't remember him denying that they played ball with each other.

By Mr. Ball:

Q. Looking again at the transcript, Government's Exhibit 1153, I ask you to look at Page 5, and ask you if you didn't say to Kost:

"In other words, you play ball back and forth.",

861 and that Kost answered, "Not necessarily. I mean it don't make sense, I mean, if we all fight among each other."? A. I find here—I find here that Kost said—first,

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I said, "Is everybody else cooperative, I said, I mean, as far as you are concerned?" I said that to Kost. And he said, "Yeah, yeah." And then I said, "Borden's?" And he said, "Yes." And I said, "Western's?" And he said, "Yes. Well, we don't bother each other."

Q. You also find that you said, "in other words, you play ball back and forth."? A. On this page here?

Yes, here it is.

Q. Is that right? A. That was after he says they don't play ball with anybody.

Q. You said, "Dean doesn't play ball?" A. He said, "Dean doesn't play ball with anybody."

Q. Then you asked, "In other words, you play ball back and forth." A. That is right.

Q. And Kost answered— A. "Not necessarily."

862 Q. Is that right? A. He said, "Not necessarily. I mean, it doesn't make sense, I mean, if we all fight among each other."

I mean, that is added to it.

Q. Yes. And that preceded this passage when you asked him if these companies cooperated? A. That is right.

Mr. Ball: All right, that is all.

The Court: Are you finished?

Mr. Ball: Yes.

The Court: Any other cross?

Mr. Tierney: One or two questions.

Cross Examination by Mr. Tierney:

Q. Mr. Newey, when you were employed by Mr. McConnell, you were given a copy of the complaint in the case of Dean vs. American Processing Company? A. Yes, sir, I was.

863 Q. And did you study that complaint? A. I went through it, yes, sir.

Q. Did you learn who the defendants were in the case? A. Yes, I did.

Q. And was Beloit Dairy one of the defendants? A. No, Beloit was not a defendant.

Q. No.

And Mr. McConnell did not tell you to go out and get evidence on the Beloit Dairy? A. No.

Q. You may be mistaken when you said on page 2238 of the transcript that Mr. Kost named Beloit Dairy as one that did not cooperate with the others? A. I could have been, yes, sir.

Mr. Tierney: No further cross.
The Court: Mr. Hart?
Mr. Hart: Yes.

864 Cross Examination by Mr. Hart:

Q. Mr. Newey, this was a tape recording machine you used? A. Yes, sir, it was.

Q. Do you know what kind? A. Yes, sir. It was a Masco tape recorder, and it was purchased at Allied Radio on West—on West Jackson Boulevard.

Q. Now, a tape recording makes use of the principle of electric magnetic attraction, doesn't it? A. That is correct.

Q. Can you successfully edit a tape recording? A. Yes, it can be.

Q. As a matter of fact, you can just take a pair of scissors and cut parts out, can't you? A. That is correct.

Q. And then by piecing together the two parts of the tape just by putting Scotch tape behind it, you can re-run, and you could not tell the difference, could you? A. Unless you examine the tape.

Q. You re-run the tape and re-record it, couldn't
865 you, on a new tape, and it wouldn't show any evidence, is that true? A. Yes, that is correct; that could be done.

Q. Now, these tape recordings, were they made shortly after your original employment by Mr. McConnell? A. Yes, I would say it was within a few weeks.

Q. But in the early part of your employment had you done other work for him before that time in connection with the Dean case? A. Yes, I had.

Q. What had you done? A. Well, I had been attempting to get some grocers to possibly come in and make statements concerning what they had got.

Q. I see.

And your contact had been with grocers before that until the time you made the tape recordings, is that right? A. That is correct, sir.

Q. And, I believe you told Mr. Tierney you had a copy of the complaint and you knew what you were trying to prove? A. That is correct.

866 Q. And you were as successful as possible in making a sincere effort to prove Mr. McConnell's contentions? A. That is correct.

Q. And after you made these tape recordings, or tape recording—not recordings—you expanded your efforts and

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contacted ex-employees of some of the dairies, didn't you? A. That is correct.

Q. And I suppose you told them about your successful efforts with your tape recording? A. I didn't tell—

Mr. Jinkinson: The Government objects to this line of interrogation as not being proper cross examination, not having been taken up in the direct.

The Court: Overruled.

By the Witness:

A. I did not tell anyone.

By Mr. Hart:

Q. You did not tell anyone? A. I did not tell anyone about these tape recordings.

Q. You did not say that you had had any tape
867 recordings? A. I did not tell anyone about the conversations I had taken down there, sir—

Q. But you did— A. —excepting Mr. McConnell and certain ones in his office.

Q. But you did indicate to them that you knew about this alleged conspiracy? A. I may have by my attitude, but I don't think I did in any specific words.

Q. And you discussed that with ex-employees? A. That is correct.

Q. For instance, Herbert Horton? A. Yes, I talked to Mr. Horton.

Q. And you discovered in your conversation that he was somewhat annoyed at the Bowman Dairy Company because they had taken his business from him?

Mr. Jinkinson: That is objected to.

The Court: Yes, that goes toward testing the credibility of the witness.

Sustained.

Mr. Hart: I think that is all.

868 Mr. Tierney: Just one question that I forgot, your Honor.

The Court: Yes, you may ask him.

Cross Examination by Mr. Tierney (Continued):

Q. When did you first apprise the Government that you had these tape recordings?

Mr. Jinkinson: That is objected to, your Honor, not being a statement in the record. I don't think that the witness said that he apprised it.

The Government knew about it before.
The Court: Sustained.

By Mr. Tierney:

Q. Did you talk with the Government about these tape recordings?

The Court: You may answer.
Mr. Jinkinson: That is—
The Court: You may answer.

By the Witness:

A. I don't remember that I talked to him.

By Mr. Tierney:

Q. Your recollection is now that you never talked
869 to the Government about this? A. My recollection is that the Government knew about it, but I don't remember how it came about.
Q. And how the Government could find out about it; they did not find out about it in a conversation? A. Not that I recall now.
Q. Where are these tape recordings now?

Mr. Jinkinson: That is objected to as being immaterial.
The Court: Sustained.
Do you have another question, Mr. Hart?
Mr. Hart: No, sir.
The Court: That is all the cross-examination?

(There was no response.)

The Court: We will recess until two o'clock this afternoon.

* * * * *

873 By the Court: Case on trial.
The Court: Resume the stand.
Redirect examination?

PAUL D. NEWEY resumed the stand, having been previously duly sworn, was examined and testified further as follows:

Redirect Examination by Mr. Jinkinson:

Q. Mr. Newey, did you inspect the tapes recently that you made in reference to the matter at 4761 North Milwaukee Avenue? A. Yes, sir, I inspected them on Wednesday last week.

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Q. Were the tapes in the same condition as they were when you turned them over to Mr. McConnell in 1950? A. They were.

Q. Did you notice any of the tapes spliced or cut in any manner? A. They were not cut or spliced in any manner.

Q. Did you initial these tapes when you originally made them and turned them over to Mr. McConnell? A. Yes, sir, I initialed the tapes as they were made and put the date on them.

Q. Were your initials on the tapes? A. Yes, they
874 were.

Q. I believe you testified in response to a question by Mr. Hart that it was possible to edit a tape.

In this particular matter would your tapes be possible to edit? A. It would be very difficult, because on almost all of my tapes in addition to the voices, there was usually a radio playing in the background for continuity as far as the sound from the tape was concerned, so if there was any splicing as far as the voices were concerned, the songs that were being played on the radio or the announcements that were being made on the radio would have been interrupted, so it could be easily detected.

Q. When you were asked to prepare yourself for testifying here what instructions were you given by the Antitrust Division or anyone connected with them? A. I was told to prepare myself to come here and testify and that I could listen to the tapes in order to refresh my memory and make notes or look over the transcripts in order to refresh my memory and make notes.

Q. Did anyone tell you what you were to put in
875 your notes? A. No, sir.

Q. No one on the Government staff told you? A. No, sir.

Q. After you prepared these notes did you show them to anyone or discuss them with anyone on the Government staff? A. No, sir, I did not.

Q. Mr. Newey, the description you gave of Kost, Mills, Galnick, Boysen and Chernow was the description as you remember them in 1950, is that correct? A. That is correct. I haven't seen any of those people since that time.

Q. Did you recognize Mr. Mills when he stood up this morning? A. I recognized him after he had stood up, but not prior to that.

Q. Had he changed in any respect from 1950 to 1953? A. Yes, he has. His physical appearance has changed. He

seems to have a little less hair now than what he had three years ago. I would say I don't think he has the same set of glasses on that he may have had on at that time.

Q. How about his weight? A. Well, his face appeared to be thinner than what it did before.

876 Mr. Jinkinson: You may cross examine.

The Court: Recross.

Mr. Ball: No recross.

The Court: Mr. Hart?

Recross Examination by Mr. Hart:

Q. Mr. Newey, when you say that there was a radio playing in the background which would, by its continuity, make you sure that nothing had been edited, would it be possible to take two tapes, one with a musical background and the other a conversation, and run them at the same time and come out with a third tape that would show both the conversation and the musical background? A. That would be possible, but that didn't happen.

Q. But it would be possible? A. It would be possible, yes.

Q. Now, as a matter of fact, merely by throwing a switch on a tape recorder you can block out any part of the conversation that you want to take out, can't you? A. Yes, you can.

877 Q. Or you could erase any part of it, couldn't you? A. Yes, you can.

Mr. Hart: That is all.

The Court: Mr. Tierney?

Mr. Tierney: Nothing.

The Court: That is all. You may step down.

(Witness excused.)

The Court: Any further testimony from the government?

Mr. Ball: If it please the Court, we are going to prepare a motion to strike a large part of Mr. Newey's testimony, but in view of some of the matters that he testified to on cross examination I would like to amplify that and I would like leave to file that a little later on.

The Court: Very well, I will hear it when you are ready.

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MOTION OF BELOIT DAIRY COMPANY FOR AN ORDER AND A JUDGMENT OF DISMISSAL

Mr. Tierney: Yes. There comes now defendant, Beloit Dairy Company, at the close of plaintiff's case, and
880 after the plaintiff has rested, and moves the Court, pursuant to Rule 41(b) of the Federal Rules of Civil Procedure, for an order and a judgment of dismissal of the Beloit Dairy Company as defendant herein, for the following reasons:

1. That plaintiff has failed to establish facts which under the law entitle it to the relief requested against Beloit Dairy Company.

2. That plaintiff has failed to prove the allegations of the complaint, that Beloit Dairy Company was a party to or participated in a combination or conspiracy to restrain or monopolize sales of fluid milk in interstate commerce to wholesale customers and public institutions in the Chicago area, in violation of Sections 1 and 2 of the Sherman Act.

3. That plaintiff has failed to prove the allegations of the complaint, that this defendant, Beloit Dairy Company, in combination with the other defendants have monopolized the sale of fluid milk in interstate commerce to wholesale customers and public institutions in the Chicago area in violation of Section 2 of the Sherman Act.

4. That plaintiff has failed to prove the allega-
881 tions of the complaint that this defendant, Beloit Dairy Company, has granted discriminatory prices, rebates, discounts, or allowances in sales of fluid milk in interstate commerce to wholesale customers in the Chicago area, as alleged in the complaint, in violation of Section 2(a) of the Clayton Act.

And 5. That the plaintiff has failed to prove any imminent and immediate danger of public injury by the alleged activities of this defendant, entitling plaintiff to injunctive relief.

The Court: Very well, I will hear argument on these motions.

I assume the motions of Belmont and Ridgeview, insofar as they relate to Counts I and II of the complaint refer, by the nomenclature, Count I to the Sherman Act, judging by the nomenclature, and Count II to the Clayton Act.

They are not separated in Counts, but they are really commingled. There is no separate Count I and Count II, but a violation of both statutes is alleged in the complaint,

and they are commingled throughout, and relief is asked on both.

Mr. Hart: That is true. I was merely trying to separate the two Acts.

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884 [FILE ENDORSEMENT OMITTED]

IN

UNITED STATES DISTRICT COURT

[TITLE OMITTED]

Petition for Appeal—filed October 2, 1953

The United States of America, plaintiff in the above-entitled cause, considering itself aggrieved by the final judgment of this Court entered on the seventeenth day of June, 1953, and the order of this Court entered on the sixth day of August, 1953 denying plaintiff's motion for a new trial, does hereby pray an appeal from said final judgment and order to the Supreme Court of the United States. Pursuant to Rule 12 of the Rules of the Supreme Court, the plaintiff presents to this Court herewith a statement showing the basis of jurisdiction of the Supreme Court to entertain an appeal in this cause.

The particulars wherein the plaintiff considers said final judgment and order erroneous are set forth in the assignment of errors and prayer for reversal accompanying this petition and to which reference is hereby made.

The plaintiff prays that its appeal may be allowed and that citation be issued as provided by law, and that a transcript of the record, proceedings, and documents upon which said final judgment and order were based, duly authenticated, be sent to the Supreme Court of the United States under the rules of said Court in such cases made and provided.

STANLEY N. BARNES
Stanley N. Barnes
Assistant Attorney General

EARL A. JINKINSON
Earl A. Jinkinson
Special Assistant to the Attorney General

Dated this 2nd day of October, 1953

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This petition is presented in open court this day and motion made in accordance with prayer of said petition, said motion is entered and continued until Oct 7 1953 — JOHN P. BARNES, *Judge*

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886 IN

UNITED STATES DISTRICT COURT

[TITLE OMITTED]

Order Allowing Appeal—filed October 2, 1953

In the above-entitled cause, the United States of America, plaintiff, having made and filed its petition praying an appeal to the Supreme Court of the United States from the final judgment of this Court in this cause entered on the seventeenth day of June, 1953 and the order of this Court entered on the sixth day of August, 1953 denying plaintiff's motion for a new trial, and having also made and filed its petition for appeal, assignment of errors and prayer for reversal, and statement of jurisdiction, and having in all respects conformed to the statutes and rules in such cases made and provided,

IT IS THEREFORE ORDERED AND ADJUDGED

That the appeal be and the same is hereby allowed as prayed for.

JOHN P. BARNES
United States District Judge

Dated this 2nd day of October, 1953.

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CITATION IN USUAL FORM SHOWING SERVICE ON STUART BALL, L. EDWARD HART, JR. and LEO F. TIERNEY OMITTED IN PRINTING.

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890 [FILE ENDORSEMENT OMITTED]

IN

UNITED STATES DISTRICT COURT

[TITLE OMITTED]

Assignment of Errors and Prayer for Reversal—filed October 2, 1953

The United States of America, plaintiff in the above-entitled cause, in connection with its petition for appeal to the Supreme Court of the United States, hereby assigns error to the record and proceedings and the entry of the final judgment of the district court on June 17, 1953, and the order of the district court of August 6, 1953 denying plaintiff's motion for a new trial, in the above-entitled cause, and says that in the entry of said final judgment and order the district court committed error to the prejudice of the plaintiff in the following particulars:

1. The court erred in holding that a deposition made by a Government witness, H. C. Eggleston, in a prior private antitrust case could not be used to refresh his recollection or to impeach his testimony.

2. The court erred in excluding testimony of two Government witnesses, H. C. Eggleston and Hans Moser, as to conversations they had with a deceased agent of defendant Borden.

3. The court erred in holding that certain tape recordings were an attorney's "work product" and could therefore not be subpoenaed by the Government from an attorney, Thomas C. McConnell, who did not represent
891 any of the parties in this action.

4. The court erred in excluding these tape recordings after said attorney had waived his claim of privilege.

5. The court erred in holding that the Government was not entitled to a decree enjoining Borden and Bowman from violating Section 2(a) of the Clayton Act, because such violation was enjoined by a decree previously entered against them in a private action.

6. The court erred in dismissing the plaintiff's complaint.

7. The court erred in denying plaintiff's motion for a new trial.

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Wherefore, plaintiff prays that the final judgment of the district court may be reversed to the extent that it is inconsistent with the errors herein assigned by the plaintiff, and for such other and fit relief as to the court may seem just and proper.

STANLEY N. BARNES
Stanley N. Barnes
Assistant Attorney General

EARL A. JINKINSON
Earl A. Jinkinson
Special Assistant to the Attorney General

Dated this 2nd day of October, 1953.

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Statement Calling Attention to the Provisions of Supreme Court Rule 12 (3) (omitted in printing)

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972 [FILE ENDORSEMENT OMITTED]

IN

UNITED STATES DISTRICT COURT

[TITLE OMITTED]

Praecipe—filed October 2, 1953

TO: The Clerk of the United States District Court for the Northern District of Illinois, Eastern Division

The appellant hereby directs that in preparing the record in the above entitled cause for its appeal to the Supreme Court of the United States, you include the following:

1. All docket entries.
2. Complaint filed June 18, 1951.

3. Final judgment as to certain defendants, entered February 19, 1953.

4. Plaintiff's offer of proof filed March 10, 1953, concerning the testimony of H. C. Eggleston.

5. Plaintiff's offer of proof, filed March 12, 1953, concerning the offered testimony of the witness Hans Moser.

6. Defendants' motions for judgment in their favor filed or made on March 24, 1953.

7. Memorandum opinion and order of Judge William J. Campbell, filed March 30, 1953, granting each defendant's motion to dismiss complaint.

8. Findings of fact, conclusions of law, and judgment dismissing cause filed June 17, 1953.

9. Defendants' motion to amend certain findings of fact filed June 29, 1953.

10. Order of Judge William J. Campbell filed July 2, 1953, denying defendants' motion to amend certain findings of fact.

973 11. Plaintiff's motion for a new trial, and exhibits attached thereto, filed June 26, 1953.

12. Order of Judge William J. Campbell filed August 6, 1953, denying plaintiff's motion for a new trial.

13. Transcript page numbers 27 through 29 inclusive, 144 through 178 inclusive, 441 through 443 inclusive, 638, 639, 769, 770, 1230, 1238, 1239, 1357, 1358, 1838, 1839, 2211 to 2214 inclusive, and 2228 through 2367 inclusive.

14. Petition for appeal.

15. Assignment of errors and prayer for reversal.

16. Statement as to jurisdiction.

17. Order allowing appeal.

18. Citation to appellees.

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19. Statement calling attention of appellees to provisions of Supreme Court Rule 12(3).

20. Praecipe for transcript of record.

STANLEY N. BARNES
Stanley N. Barnes,
Assistant Attorney General.

EARL A. JINKINSON
Earl A. Jinkinson,
Special Assistant to the Attorney General.

Dated this 2nd day of October, 1953.

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Notice of Motion (omitted in printing)

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Proof of Service (omitted in printing)

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977 [FILE ENDORSEMENT OMITTED]

IN

UNITED STATES DISTRICT COURT

[TITLE OMITTED]

Motion to Extend Time in Which to File Counter-Praecipe—filed October 9, 1953

Pursuant to Rule 10(2) of the Rules of the Supreme Court of the United States, the undersigned defendants move that the time within which said defendants may file their Counter Praecipe be extended to and including October 27, 1953.

THE BORDEN COMPANY
BELMONT DAIRY COMPANY

By SIDLEY AUSTIN BURGESS & SMITH
Their Attorneys

BOWMAN DAIRY COMPANY
RIDGEVIEW FARMS DAIRY, INC.

By L. EDWARD HART, JR.
Their Attorney

BELOIT DAIRY COMPANY

By MAYER, MEYER, AUSTRIAN & PLATT
Their Attorneys

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979 IN

UNITED STATES DISTRICT COURT

[TITLE OMITTED]

Order Extending Time—filed October 9, 1953

On motion of defendants, The Borden Company, Belmont Dairy Company, Bowman Dairy Company, Ridgeview Farms Dairy, Inc., and Beloit Dairy Company, pursuant to Rule 10(2) of Rules of the Supreme Court of the United States, it is hereby ordered that the time within which said defendants may file their Counter Praecipe is extended to and including Oct. 27th, 1953.

ENTER

CAMPBELL
Judge

October 9, 1953.

996-1009 * * * * *

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Notice of Filing Counter-Praecipe (omitted in printing)

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1012 [FILE ENDORSEMENT OMITTED]

IN

UNITED STATES DISTRICT COURT

[TITLE OMITTED]

Counter-Praecipe—filed October 27, 1953

TO: The Clerk of the United States District Court
for the Northern District of Illinois, Eastern Division

Pursuant to Rule 10(2) of the Rules of the Supreme Court of the United States, Appellees hereby direct that in preparing the record in the above-entitled cause for its appeal to the Supreme Court of the United States, you include the following:

1. Order of Judge William J. Campbell, filed October 9, 1953, enlarging the time in which appellees may file their Counter-Praecipe.

2. Order of Judge William J. Campbell, entered and filed on March 5, 1953, limiting the scope of proof.

3. Trial transcript, pages 14; 54; 69; 95; 202; 302; 399; 406 through 448 inclusive; 454 through 456 inclusive; 460 through 493 inclusive; 499 through 501 inclusive; 514 through 566 inclusive; unnumbered index page immediately following page 566 in volume 6 of the trial transcript;
569 through 665 inclusive; 672 through 754 inclusive;
1013 unnumbered index page immediately following page 754 in volume 8 of the trial transcript; 757 through 850 inclusive; 878; 902 through 914 inclusive; 947; 1050; 1140; 1252; 1354; 1500; 1568; 1685; 1733; 1830; 1934; 2023; 2134 through 2136 inclusive; 2216 through 2217 inclusive; 2295; 2360; 2401; 2415 through 2417 inclusive and 2477.

4. Defendants' motion to strike certain exhibits attached to plaintiff's motion for a new trial, filed on July 6, 1953.

5. Appellees' motion to dismiss or to affirm filed on October 19, 1953.

6. Reply of appellee Beloit Dairy Company to appellant's statement as to jurisdiction, and its separate motion to dis-

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miss it as an appellee and to affirm judgment below dismissing complaint as to it, filed on October 19, 1953.

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7. This Counter-praecipe.

STUART S. BALL
Stuart S. Ball

H. BLAIR WHITE
H. Blair White

Attorneys for Appellees
The Borden Company and
Belmont Dairy Company

L. EDWARD HART, JR.
L. Edward Hart, Jr.

JOHN PAUL STEVENS

Attorneys for Appellees
Bowman Dairy Company and
Ridgeview Farms Dairy, Inc.

LEO F. TIERNEY
Leo F. Tierney

CHARLES L. STEWART, JR.
Charles L. Stewart, Jr.

Attorneys for Appellee
Beloit Dairy Company

October 27, 1953

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1015 [FILE ENDORSEMENT OMITTED]

IN

UNITED STATES DISTRICT COURT

[TITLE OMITTED]

Amendment to Counter-Praecipe—
filed November 5, 1953

TO: The Clerk of the United States District Court
for the Northern District of Illinois, Eastern Division

On October 27, 1953, pursuant to Rule 10(2) of the Rules of the Supreme Court of the United States, Appellees filed their Counter-Praecipe. Item 2 of that Counter-Praecipe reads as follows:

2. Order of Judge William J. Campbell, entered and filed on March 5, 1953, limiting the scope of proof.

While pages 4, 5 and 118 of the trial transcript indicate that the order was signed on March 5, 1953, the order bears the date February 27, 1953.

Appellees hereby amend Item 2 of their Counter-Praecipe as follows:

2. Order of Judge William J. Campbell, dated February 27, 1953, limiting the scope of proof.

Appellees hereby direct that in preparing the record in the above-entitled cause for its appeal to the Su-
1016 preme Court of the United States that you include Item 2 of the Counter-Praecipe, as amended, and this Amendment to the Counter-Praecipe.

STUART S. BALL
Stuart S. Ball

H. BLAIR WHITE
H. Blair White

Attorneys for Appellees
The Borden Company and
Belmont Dairy Company

L. EDWARD HART, JR.
L. Edward Hart, Jr.

JOHN PAUL STEVENS
John Paul Stevens

Attorneys for Appellees
Bowman Dairy Company and
Ridgeview Farms Dairy, Inc.

LEO F. TIERNEY
Leo F. Tierney

CHARLES L. STEWART, JR.
Charles L. Stewart, Jr.

Attorneys for Appellee
Beloit Dairy Company

November 5, 1953

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CLERK'S CERTIFICATE TO FOREGOING TRANSCRIPT OMITTED IN PRINTING.

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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1953

No. 464

UNITED STATES OF AMERICA,

Appellant,

— v. —

THE BORDEN COMPANY, *et al.*

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF ILLINOIS

Statement of Points to Be Relied upon and Designation of Parts of Record to Be Printed—filed November 25, 1953

a. Appellant adopts for its statement of points upon which it intends to rely in its appeal to this Court the points contained in its Assignment of Errors heretofore filed.

b. Appellant designates for printing by the Clerk of this Court the entire record in this cause as filed in this Court pursuant to appellant's praecipe, and appellees' counter-praecipe, to the clerk of the United States District Court for the Northern District of Illinois, except that Items 16, 18 and 19 of appellant's praecipe may be omitted from printing.

November 24, 1953.

ROBERT L. STERN
Acting Solicitor General.

1021 IN THE

SUPREME COURT
OF THE UNITED STATES

October Term, 1953

No. 464

[TITLE OMITTED]

Stipulation as to the Printing of the Record—filed January 22, 1954 (omitted in printing)

* * * * *

1027 IN THE

SUPREME COURT
OF THE UNITED STATES

October Term, 1953

[TITLE OMITTED]

Suggestion of a Diminution of the Record and Motion to Supplement the Record (omitted in printing)

* * * * *

1035 SUPREME COURT
OF THE UNITED STATES

October Term, 1953

No. 464

[TITLE OMITTED]

Appellees' Further Designation for Printing the Record (omitted in printing)

* * * * *

1040

SUPREME COURT
OF THE UNITED STATES

No. 464—October Term, 1953

UNITED STATES OF AMERICA,

Appellant,

— vs. —

THE BORDEN COMPANY *et al.*

**Order Noting Probable Jurisdiction—
filed December 14, 1953**

APPEAL from the United States District Court for the Northern District of Illinois.

The statement of jurisdiction in this case having been submitted and considered by the Court, probable jurisdiction is noted.

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

Civil No. 51 C 947

UNITED STATES OF AMERICA, PLAINTIFF,

vs.

THE BORDEN COMPANY, ET AL., DEFENDANTS

STATEMENT AS TO JURISDICTION

In compliance with Rule 12 of the Supreme Court of the United States, as amended, the United States of America submits herewith its statement particularly disclosing the basis upon which the Supreme Court has jurisdiction on appeal to review the judgment of the district court entered in this cause on June 17, 1953.

OPINION BELOW

The opinion of the district court has not been reported. A copy is attached hereto as Appendix A.

JURISDICTION

The judgment of the district court was entered on June 17, 1953. A timely petition for new trial was denied on August 6, 1953. A petition for appeal is presented to the district court herewith on

October , 1953. The jurisdiction of the Supreme Court to review by direct appeal the judgment entered in this cause is conferred by Section 2 of the Expediting Act of February 11, 1903, 32 Stat. 823, 15 U.S.C. 29, as amended by Section 17 of the Act of June 25, 1948, 62 Stat. 869.

The following decisions sustain the jurisdiction of the Supreme Court to review the judgment on direct appeal in this case:

United States v. *United States Gypsum Co.*, 333 U.S. 364;

United States v. *National Ass'n of Real Estate Boards,* 339 U.S. 495.

QUESTIONS PRESENTED

1. Whether the district court erred in not allowing the Government to use a deposition, taken in another case, for the purpose of showing that part of the testimony given by a crucial Government witness, who proved hostile, was contrary to statements made in his earlier deposition.

2. Whether the court erred in ruling that certain tape recordings of statements made by various agents of defendants, which the court excluded, were within the privilege attaching to the "work product" of an attorney and that such privilege had not been waived.

3. Whether the court properly held inadmissible, under the Illinois "dead man's" statute, testimony as to conversations with a deceased agent of a defendant.

4. Whether a fact that the judgment entered in a

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private suit enjoined the defendants from selling at discriminatory prices justified the court in refusing to grant the Government relief against such conduct.

STATUTES INVOLVED

The pertinent provisions of Section 1, 2 and 4 of the Act of July 2, 1890, 26 Stat. 209, as amended (15 U.S.C. 1, 2, 4), commonly known as the Sherman Act, are as follows:

> Sec. 1. Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is hereby declared to be illegal: * * *. Every person who shall make any contract or engage in any combination or conspiracy hereby declared to be illegal shall be deemed guilty of a misdemeanor, * * *.
>
> Sec. 2. Every person who shall monopolize, or attempt to monopolize, or combine, or conspire with any other person or persons, to monopolize any part of the trade or commerce among the several States, or with foreign nations, shall be deemed guilty of a misdemeanor, * * *.
>
> * * * * *
>
> Sec. 4. The several district courts of the United States are hereby invested with jurisdiction to prevent and restrain violations of this act; and it shall be the duty of the several district attorneys of the United States, in their respective districts, under the direction of the Attorney General, to institute proceedings in

equity to prevent and restrain such violations. * * *

The pertinent provisions of Sections 2(a) and 15 of the Act of October 15, 1914, 38 Stat. 730, as amended (15 U.S.C. 12(a), 25), commonly known as the Clayton Act, are as follows:

> Sec. 2(a). It shall be unlawful for any person engaged in commerce, * * * either directly or indirectly, to discriminate in price between different purchasers of commodities of like grade and quality, where either or any of the purchases involved in such discrimination are in commerce * * * and where the effect of such discrimination may be substantially to lessen competition or tend to create a monopoly in any line of commerce, or to injure, destroy, or prevent competition with any person who either grants or knowingly receives the benefit of such discrimination, or with customers of either of them: * * *.
>
> * * * * *
>
> Sec. 15. The several district courts of the United States are hereby invested with jurisdiction to prevent and restrain violations of this Act, and it shall be the duty of the several district attorneys of the United States, in their respective districts, under the direction of the Attorney General, to institute proceedings in equity to prevent and restrain such violations. * * *

STATEMENT

This is a civil proceedings instituted by the United States in June 1951 charging ten Chicago

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dairies with conspiring to restrain and to monopolize, and with monopolizing, the sale of fluid milk to wholesale customers and certain public institutions in the Chicago area, in violation of Sections 1 and 2 of the Sherman Act. The complaint also charges that each defendant had sold milk at discriminatory prices in violation of Section 2(a) of the Clayton Act.

After the district court (Judge Campbell) had, over the Government's objection, referred the case to a master for hearing and report, the Government filed in this Court a motion for leave to file a petition for writ of mandamus to require vacation of the order of reference. *United States* v. *United States District Court for the Northern District of Illinois, Eastern Division,* Misc. No. 271, October Term, 1952. Six days after the filing of this motion, and prior to any action thereon, Judge Campbell vacated the order of reference.

In February 1953 a consent decree was entered against five of the defendants enjoining them from continuing conduct of the kind charged against them in the complaint. The defendants thus enjoined were relatively small dairies. The case against the remaining five defendants—The Borden Company (Borden) and Bowman Dairy Company (Bowman), the two principal dairies serving Chicago, a subsidiary of each of these defendants, and one small dairy, Beloit Dairy Co.—went to trial before Judge Campbell early in March. At the close of the Government's case the defendants moved for dismissal of the action upon the ground that the

Government had failed to show that it was entitled to relief.

The district court on March 30, 1953, filed an opinion holding that, while the evidence showed that Borden and Bowman had taken parallel action in certain matters, such evidence as there was that the defendants had acted by agreement and concert was too slight and inconclusive to establish combination or conspiracy, the foundation of the charges of Sherman Act violation. The court also held that, while the evidence showed that Borden and Bowman had each sold at discriminatory prices, the Government's claim for relief against violation of Section 2(a) of the Clayton Act had been, in effect, rendered moot by reason of the fact that the judgment entered against Borden and Bowman in a private antitrust suit comprehensively enjoined sales at discriminatory prices. The court accordingly concluded that the complaint should be dismissed in its entirety as against the defendants who were before it, the present appellees.

The district court subsequently filed findings of fact and conclusions of law and entered judgment for the defendants. A timely motion for new trial was denied. In the Government's appeal the following rulings made in the course of trial are among the grounds set forth for reversal of the judgment:

(1) Prior to trial the Government considered that its most important witness was H. C. Eggleston, a vice president of Bowman for several years during the period the alleged conspiracy was operating. In a deposition taken in a private antitrust

case[1] Eggleston had testified to numerous conspiratorial acts on the part of Borden and Bowman. When Eggleston appeared as a witness in the instant case, his testimony was in several respects directly contrary to his deposition testimony and damaging to the Government's case. The district court then allowed the Government to examine Eggleston on the basis that he was a hostile witness, but the court refused to permit the Government to use the deposition for the purpose of refreshing his memory or impeaching his testimony. This ruling was made upon the ground that, under a rule of the local district court, the deposition had been sealed. Shortly thereafter, on March 5, 1953, the deposition was properly unsealed at the instance of counsel for the plaintiff in the private action,[2] but the district court, notwithstanding the unsealing, continued to

[1] In that case, *Dean Milk Co.* v. *American Processing and Sales Co.* (D. C., N. D. Ill. E. D., No. 49C 1159), injunctive relief and triple damages were sought on the basis of alleged violations of the Sherman and Clayton Acts similar to those charged in the present case. The defendants included Borden and Bowman. The case was settled on Decemb[illegible] 3, 1952, by the entry of a consent decree enjoining the d[illegible]dants from violating the Sherman and Clayton Acts, and p[illegible]ment by the defendants of a substantial sum of money.

[2] Two of the defendants in the private action, Borden and Bowman, moved to reseal certain depositions on file in that cause, including the Eggleston deposition. On April 16, 1953, Judge Igoe entered an order denying resealing of the Eggleston deposition. In this order the court found (1) that the action of plaintiff's counsel in unsealing depositions in the case was "justified" and (2) that, in view of the charge that Eggleston's testimony in another cause was in conflict with his deposition filed in the private action, "it would not be in the interest of justice to reseal the Eggleston deposition until an investigation has been made of the facts and circumstances concerning such alleged conflict by the Department of Justice of the United States."

refuse to permit the Government to use the deposition in cross-examining Eggleston.

(2) A subpoena duces tecum issued, at the Government's request, to Thomas C. McConnell, counsel for the plaintiff in the private antitrust action (see note 1, *supra*), called for the production of certain tape recordings. McConnell, in preparing for trial of the private action, had rented a retail store in which milk was sold, wired it for sound, and placed a professional investigator (Paul Newey) who was a lawyer behind the counter in the role of store owner. Various conversations which Newey had with representatives of Borden and Bowman relating to arrangements and agreements by these companies not to solicit each other's wholesale customers were electrically recorded. When McConnell, who was not counsel for any of the parties to the Government litigation, made return on the subpoena in open court, the court sustained his claim that the recordings were privileged as his "work product" and need not be surrendered.

After the Government had subpoenaed Newey, McConnell addressed a letter to him which stated in part that "if the Court sees fit to require you to do so you may submit the tape recordings and the transcripts thereof to the defendants in the case as well as to the Government for their use in the case." Although this letter was shown to the court, it declined to permit the playing of the recordings. The court ruled that Newey might refresh his recollection by examining a transcript of the recordings, and Newey, in testifying, so employed the

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ranscript. Nevertheless, the court, as stated in its pinion, treated Newey's testimony as "valueless" nd "completely" disregarded it, upon the ground hat it was based, not on independent recollection, ut on reading the transcript and notes made there- rom.

(3) The court excluded the testimony of two wit- nesses (Moser and Eggleston) relating to conversa- ions between them and a deceased sales manager of Borden upon the ground that the testimony was not admissible under an Illinois statute (Ill. Rev. Stat., 1945, C. 51, §4) which bars testimony by a party to an action concerning conversations with a deceased agent of an adverse party.

THE QUESTIONS ARE SUBSTANTIAL

1. The question whether it is proper to dismiss a suit by the United States charging violation of the antitrust laws, for the sole reason that a decree entered in a private action gives injunctive relief against the violation, presents an important ques- tion of law upon which this Court has not passed.

Section 15 of the Clayton Act (15 U.S.C. 25) makes it the "duty" of the several United States district attorneys, under the direction of the Attor- ney General, to institute civil proceedings to pre- vent and restrain violations of the Act, and vests in the federal district courts jurisdiction of such pro- ceedings. Entry of a decree in private antitrust litigation plainly does not alter the Government's statutory power and duty to enforce the Act, or the district court's statutory duty to entertain such an

enforcement proceeding. Congress provided for Government enforcement in order to protect the public against the evils at which the statute is aimed. An antitrust decree in favor of a private litigant does not assure equivalent protection. If such decree is violated, the United States, not being a party to the decree, cannot enforce obedience thereto, and the private litigant may, for reasons of his own, fail to take steps, by contempt proceedings or otherwise, to procure obedience to the decree.

The Attorney General is, as it were, the "statutory vindicator" of the public policy expressed in the antitrust laws. *United States* v. *Bendix Home Appliances,* 10 F.R.D. 73, 75 (S.D.N.Y.). We submit that the decision of the court below runs counter to both the policy of the statute and its express provisions.

2. The district court found failure of proof of conspiracy. It so found after it had barred effective opportunity to cross-examine or impeach a key witness and had excluded material evidence offered to show conspiracy. Since appellate review lies only in this Court, failure to entertain an appeal attacking the validity of rulings which may have been decisive of the ultimate issue would mean that in a civil antitrust proceeding of this kind the district court is the final arbiter both as to the facts established by the evidence (cf. *United States* v. *Oregon Medical Society,* 343 U. S. 326, 330) and as to the evidence which is admissible.

This Court has heretofore reviewed, both by certiorari and by appeal, crucial evidentiary and

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ther trial rulings in Government antitrust suits. *Jnited States* v. *Socony-Vacuum Oil Co.*, 310 U. S. 50, 229-243; *United States* v. *U. S. Gypsum Co.*, 33 U. S. 364, 388-389, 393. The rulings attacked n the instant appeal were, individually, of critical mportance. Not only were these rulings clearly erroneous, but, considered collectively, they plainly operated to deny to the Government a fair opportunity to present its case. Inasmuch as the motion to dismiss the complaint was granted on the ground that the Government had failed to introduce sufficient evidence of violations of the antitrust laws, it is obvious that the improper exclusion of critical evidence went to the very heart of the judgment of the district court.

(a) The court's refusal to allow the Government to examine Eggleston on the basis of his prior deposition was materially prejudicial. Eggleston was the only officer of a defendant called as a witness; his deposition testimony related to acts of the defendants while he was such officer; and the district court, putting complete faith in Eggleston's veracity, rejected testimony of another witness which differs from Eggleston's *trial* testimony. The court said in its opinion (Appendix A, *infra*):

> In certain respects, Eggleston's testimony negates the material contained in Heinz's deposition.[3] Since I believe Eggleston was, over all, a truthful witness, and since there is

[3] The opinion notes that counsel had agreed that this deposition, taken just before the trial, might be used as evidence at the trial.

> nothing in the record to corroborate Heinz's testimony, I must discount that testimony.

But this statement was made after the court had refused to let the Government impeach Eggleston out of his own mouth. Had the impeaching testimony been admitted, the court would have had good reason not to give credence to Eggleston's trial testimony. This, in turn, would have raised Heinz's testimony, according to the court's rationale, to the level of credible substantive evidence. And Heinz's testimony was itself substantial evidence of the truth of the Government's case.

(b) The rulings of the district court prevented the Government from introducing as evidence tapes which recorded material admissions made by certain agents of defendants. We submit that in this connection the district court erred in two respects, first, in ruling that the tapes were "work product" of an attorney privileged against production and, second, in excluding the tapes as evidence notwithstanding the attorney's waiver of claim of privilege. It is clear that, here too, had the evidence been admitted and considered, rather than improperly excluded, the district court could not reasonably have granted the motion to dismiss the complaint.

Hickman v. *Taylor*, 329 U. S. 495, holds that the discovery provisions of the Federal Rules of Civil Procedure do not permit a party to pending litigation to obtain from counsel for an adverse party material which represents work papers of the at-

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torney in preparing for trial of the cause. The Court concluded that it was contrary to public policy to interpret the discovery provisions as having such broad scope that a party could probe the private files of an attorney, and capitalize on the skill and diligence of the attorney for his opponent in preparing the case for trial. The tape recordings which the Government sought to subpoena from counsel for the plaintiff in the private antitrust action are not within the holding or the principle of the *Hickman* decision. The private litigation was then settled, so that delivery of the tapes or disclosure of their contents could not interfere with the attorney's intended use of the tapes. In addition, unlike the situation in the *Hickman* case, the requested disclosure was not to an adverse party; the attorney to whom the subpoena ran did not represent any of the parties to the Government suit. Finally, the doctrine of the *Hickman* case does not extend to a verbatim recording of statements, not otherwise available, made by potential witnesses. 329 U. S. at pp. 512-513.

The attorney in the private litigation authorized his agent, Newey, to submit the tape recordings to the defendants and to the Government "if the Court sees fit to require you to do so." Since a privilege is personal to the party entitled to assert it, we submit that by the foregoing authorization the attorney waived any claim of privilege which he may have had, and that the court therefore erred in not permitting the Government to introduce the tapes in evidence.

(c) The district court excluded testimony by two Government witnesses as to conversations with a deceased agent of Borden. The offered testimony, which tended to establish the alleged conspiracy, was excluded on the basis of an Illinois Statute providing in part:

> * * * and in every action, suit or proceeding a party to the same who has contracted with an agent of the adverse party—the agent having since died—shall not be a competent witness as to any admission or conversation between himself and such agent * * *.

This statute, by its terms and as interpreted by the Illinois courts, does not apply to testimony offered by a person who is not a party to the action and not a party to a contract the subject of litigation. *Reilly Tar & Chemical Co.* v. *Lewis,* 320 Ill. App. 117, 121 (1945); *Spencer* v. *Wilsey,* 330 Ill. App. 439, 447 (1947). Neither of the two Government witnesses whose testimony was barred under Illinois statute was a party to the present action or to a contract the subject of the litigation.

In sum, the evidentiary rulings were clearly erroneous. That they had more than technical significance is clear from both the posture and the record in this case. The motion to dismiss the complaint was granted on the theory that the Government had not introduced enough evidence to support its allegations of violations of the Sherman Act. This conclusion was hardly a startling one on the record, inasmuch as the court had im-

properly excluded the vitals of the Government's case. Had the court admitted the foregoing testimony, which we submit it should have done, it could not reasonably have granted the motion to dismiss the complaint.

Finally, the questions presented by this appeal arise out of a misconception by the district court of the Government's role as enforcer of the antitrust laws and out of clearly erroneous rulings on evidence, which prevented the Government from making out its substantive case. These questions are substantial and are of public importance. This Court has been designated by Congress as the sole reviewing court for such questions. Accordingly, we submit that this Court should note probable jurisdiction and, after argument, reverse the judgment below.

Respectfully submitted,

ROBERT L. STERN,
Acting Solicitor General.

APPENDIX A

IN THE UNITED STATES DISTRICT COURT, NORTHERN DISTRICT OF ILLINOIS, EASTERN DIVISION

No. 51 C 947

UNITED STATES OF AMERICA, PLAINTIFF,

vs.

THE BORDEN COMPANY, ET AL., DEFENDANTS

Before Hon. WILLIAM J. CAMPBELL, Judge

MEMORANDUM AND ORDER

1. The Government charges that each of ten defendant dairy companies has been engaged in a conspiracy to restrain and to monopolize, and has monopolized interstate trade and commerce in the sale of fluid milk to wholesale customers and certain public institutions in the Chicago area, in violation of Sections 1 and 2 of the Sherman Act, 15 U. S .C. A., Secs. 1 and 2. The Government also charges that each of ten defendant dairy companies has sold fluid milk in interstate trade and commerce to different wholesale purchasers in the Chicago area at prices which discriminate between said purchasers of fluid milk of like grade and quality, and that the effect of such alleged discrimination may have been and may continue to be substantially to lessen competition or tend to

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create a monopoly in the sale of fluid milk to wholesale purchasers in the Chicago area, or to injure, destroy or prevent competition between the aforesaid wholesale purchasers knowingly receiving the benefit of such price discriminations and other wholesale customers not receiving the benefit of such discriminations, in violation of Section 2(a) of the Clayton Act, as amended, 15 U. S. C. A., Sec. 13(a).

Paragraph 27 of the complaint defines the alleged conspiracy to monopolize in the following manner:

> "The aforesaid combination and conspiracy has consisted of a continuing understanding and concert of action among the defendants, the substantial terms of which have been:
>
> "(a) That each defendant refrain from competing for the fluid milk business of the wholesale customers of another defendant;
>
> "(b) That each defendant offer inducements such as discriminatory prices, rebates, discounts, lump sum cash payments, interest-free loans, or the furnishing of store equipment or other gratuities to wholesale customers of non-defendant distributors of fluid milk to cause said customers to discontinue their purchases of fluid milk from said non-defendant distributors and to purchase fluid milk from the defendant offering such inducement;
>
> "(c) That each defendant induce its store wholesale customers to agree to maintain the retail prices 'suggested' by the defendants;

"(d) That the defendants Bowman and Borden maintain and enhance their dominant market position by acquiring the businesses, including customer outlets, of competing distributors;

"(e) That defendants Bowman and Borden organize and operate 'fighting companies' in order to suppress and destroy the competition of non-defendant distributors;

"(f) That the defendants collusively allocate and share among themselves the business of selling fluid milk to public institutions;

"(g) That the defendants agree upon, fix, and maintain prices for the sale of fluid milk to public institutions by submitting prearranged, bogus, and collusive bids for the sale of fluid milk to such institutions."

Paragraphs 28 through 45 of the complaint contain detailed descriptions of some of the general charges outlined in paragraph 27; these more descriptive paragraphs will be referred to wherever necessary in the course of this memorandum.

In its prayer for relief, the government asks that the alleged conspiracy to monopolize interstate commerce in the sale of fluid milk, as described above, be decreed to be in violation of Sections 1 and 2 of the Sherman Act; that the defendants be decreed to have monopolized interstate commerce in the sale of fluid milk, as described above, in violation of Section 2 of the Sherman Act; that the discriminations in price for fluid milk of like grade and quality, which each of the defendants has allegedly granted to certain of its wholesale customers and not to other of its whole-

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sale customers, be decreed to be in violation of Section 2(a) of the Clayton Act, as amended; that the defendants, individually and collectively, be perpetually enjoined from continuing the alleged discriminations and from carrying out the alleged conspiracy to monopolize and the alleged monopolization of commerce in the sale of fluid milk, as described above; that the defendant Borden Company be required to dispose of its entire interest in defendant Belmont Dairy to parties who are not named as defendants; that the defendant Borden Company be required to submit a plan for the divestiture of such of its plants, facilities and other assets, used by its Chicago Milk Division, as is necessary to restore effective competition in the distribution and sale of fluid milk to wholesale customers and public institutions in the Chicago area; that the defendant Bowman Dairy Company be required to dispose of its entire interest in defendant Ridgeview Farms Dairy to parties who are not named as defendants; that defendant Bowman Dairy Company be required to submit a plan for the divestiture of such of its plants, facilities and other assets used by it, as is necessary to restore effective competition in the distribution and sale of fluid milk to wholesale customers and public institutions in the Chicago area; that the agreements, understandings, arrangements and practices of the defendants, alleged in the complaint, be ordered terminated and cancelled. The government has asked for certain other injunctive relief, particularly with reference to certain alleged violations of Section 2(a) of the Clayton Act. I shall describe and comment upon these particular re-

quests for relief in another part of this memorandum.

An extended pre-trial conference was held. At the outset of the conference, counsel apprised the court that five of the ten defendants were conducting negotiations with the government, and that it was likely that agreement would be reached on a consent decree. These negotiations did result in the entry of a consent decree, and consequently, five defendants—American Processing and Sales Company, Capitol Dairy Company, Hunding Dairy Company, Meadowmoor Dairies, and Western United Dairy Company—did not appear at or participate in the trial. Counsel are now reminded of my comments on this decree, appearing of record at the time of its entry.

Five nonconsenting defendants—the Borden Company and its subsidiary, Belmont Dairy Company, Bowman Dairy Company and its subsidiary, Ridgeview Farms Dairy, Inc., and Beloit Dairy Company—remained as participants in the pre-trial conference, and appeared as defendants at the trial. For the purposes of this memorandum, the court is concerned solely with those five defendants.

A lengthy pre-trial order emerged from the conference. That order contains numerous agreements of fact, agreements on the manner in which certain evidence would be used at the trial, and agreements as to the issues of the case. At this time, I wish to thank all counsel for the able and workmanlike manner in which they participated in the conference and prepared the pre-trial order. I shall refer to specific provisions of the order in the course of this memorandum.

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The government has presented its evidence, and the matter is now before the court on the motion of each defendant to dismiss the complaint, or parts thereof.

The first disputed matter which I must resolve entails a construction of Federal Rule 41(b), which provides:

> "After the plaintiff has completed the presentation of his evidence, the defendant, without waiving his right to offer evidence in the event the motion is not granted, may move for a dismissal on the ground that upon the facts and the law the plaintiff has shown no right to relief. In an action tried by the court without a jury the court as trier of the facts may then determine them and render judgment against the plaintiff, or may decline to render any judgment until the close of all the evidence. If the court renders judgment on the merits against the plaintiff, the court shall make findings as provided in Rule 52(a). Unless the Court in its order for dismissal otherwise specifies, a dismissal under this subdivison * * * operates as an adjudication upon the merits."

Plaintiff contends that this court, in considering the instant motions, is precluded from weighing the evidence. Plaintiff vigorously objects to the defendants' use of the phrase "preponderance of the evidence." According to plaintiff's construction of the Rule, this court must now determine whether or not the evidence considered in a light most favorable to the plaintiff, presents a prima facie case for relief; and, the argument runs, if such a prima facie

case is discovered, defendants' motions must be denied. Such a construction of Rule 41(b) has been flatly rejected by the Court of Appeals for this circuit. In *Allred* v. *Sasser,* 170 F. 2d 233 (7 Circ., 1948), it was made clear that in disposing of a motion to dismiss at the close of plaintiff's case, the court, as trier of fact, must weigh and evaluate the evidence. The meaning of Rule 41(b) is unmistakable after a reading of this language from the *Allred* opinion:

> "... the trial court was the trier of the facts, and in considering the evidence was not bound to view it in a light most favorable to the plaintiff, with all attendant favorable presumptions, but was bound to take an unbiased view of all the evidence, direct and circumstantial, and accord it such weight as he believed it entitled to receive."

The Rule was similarly construed by the court in *Gary Theatre Co.* v. *Columbia Pictures Corp.,* 120 F. 2d 891 (7 Cir., 1941), and, more recently, in *Chicago & N. W. Ry. Co.* v. *Froehling Supply Co.,* 179 F. 2d 133 (7 Cir., 1950).

This court is, therefore, under an affirmative duty to review all the evidence thus far presented, and, upon the basis of that review, to determine whether or not the government's evidence warrants the relief sought in the complaint.

I shall first consider all evidence which was introduced to prove violations of the Sherman Act. The evidence may appear disjointed at times; that is because the government necessarily commingled evidence which tends to prove violations of the

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herman Act with evidence which tends to prove layton Act violations. I should also note at the utset that I shall consider many items of doubtful elevance and materiality; in another context, such vidence would be excluded summarily. However, s I indicated at the trial, in a case of this nature nd scope, the government must be afforded any pportunity, within reason, to support the charges n its complaint. Conspiracies of the sort described n the complaint are difficult to prove, and most ften can be proved only through the use of evidence hich is circumstantial and seemingly remote. herefore, in my rulings on the evidence at the trial, nd in my review of the evidence at this time, I have dmitted and considered any evidence which might n some manner tend to prove the existence of a onspiracy.

Testimony of Witnesses Tending to Prove the Existence of a Conspiracy to Monopolize Wholesale Customers in the Chicago Area.

A. *Solicitors or "contact men" employed by the defendants.*

Seven government witnesses were, at one time or nother, employed by the Borden Company or the Bowman Dairy Company to solicit new wholesale ccounts. They testified as to certain instructions given to them in the course of their employment, as o some practices current in the industry at the ime of their employment, and as to conversations which they had or overheard during their employment. I have outlined this segment of the testimony nost carefully, for it is apparently, the most direct vailable evidence of the alleged conspiracy. List-

ing these seven witnesses in the order of their appearance at the trial, that part of their testimony relevant to the proof of a conspiracy is as follows:

(1) *William H. Horton.* In 1941 and 1942, Horton was employed by the Bowman Dairy Company as a solicitor. He received a two-week training period from a Mr. Morley, whom he was replacing. Morley told him how to solicit, and what stops to solicit. Morley explained that "open competition" was "new business, business which was closed and reopened after a period of thirty days, and other dairies that were what they call cut-rate dairies, such as Meadowmoor and smaller ones." Morley further explained that "closed competition" consisted of "Borden, Hunding, Capitol, Western", and "one or two other stops that I forget." Horton was told not to solicit "closed competition."

In the early part of 1942, Horton solicited and won the business of a stop being served by the Capitol Dairy Company. Messrs. Philippi and Moller of the Bowman Company directed the return of this stop to the Capitol Company.

On cross examination, Horton stated that the Bowman officers said that they desired the return of the store to Capitol because the store owner was a relative of a Mr. Shankman, an official of Capitol Dairy Company.

(2) *Otto A. Sedlak.* Sedlak was a solicitor of wholesale accounts for the Bowman Company for three and one-half years, beginning in 1941 or 1942. In 1942, he was told by his superior, a Mr. Block, that he was not supposed to solicit stops like "Borden, Capitol, Western-United." He testified of instances wherein his superiors did not permit him

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to begin serving stops which were then served by Borden or Capitol, although the proprietors were willing to be served by Bowman. He testified that in the latter part of 1944, he overheard Block speaking on the telephone to a Mr. Katz of the Western-United Company. He overheard Block state to Katz: "You know you took one of our stores, don't you?—Do you know what this means?—We have to go out and get one of yours."

(3) *Herbert W. Horton.* Horton was also a Bowman solicitor during part of the period embraced by the complaint. Mr. Buthman, an official of the Bowmany Company, told him that he "wasn't to solicit any stops, such as Wanzer, Bunding, Beloit, Borden, Western United, Capitol Dairy, and Hawthorne—all the major large ones that was there." Mr. Kernkamp, another Bowman official, told him that "open competition was any stops, like these smaller dairies, like Dean . . . . After thirty days with Dean, if the Dairy that lost them did not retain them, then that was considered open competition, and I could go in and try to get them for the Bowman Dairy also." Horton made clear that his activities were directed principally, perhaps solely, toward the Dean Milk Company. For example, a list of Dean stops was given to him; but the names of stops served by other dairies, even those characterized as "open competition", were not included.

In March or April of 1946, Horton solicited and "lined up" a Dean stop which had formerly been served by Hunding Dairy. Mr. Kernkamp, his superior, told him that Mr. Hunding of Hunding Dairy requested that Bowman abstain from further solicitation because Hunding still had hopes of re-

capturing the stop from Dean. Nevertheless, a week or so later, Horton related, he managed to get the business of that stop.

Horton also testified that a Mr. Spitzer, an official of Ridgeview Farms Dairy, told him upon Spitzer's transfer from Bowman to Ridgeview, that "he had worked at Ridgeview before, and that that is the fighting company that Bowman used against the cut-rate dealers."

(4) *Lorne Snoberger.* Snoberger was a Bowman solicitor in 1946. He stated that when he was first employed as a solicitor, Mr. Kernkamp, his superior, told him to solicit stops served by the Dean Milk Company. He was not told to solicit stops served by other dairies. During his employment by Bowman as a solicitor, his activities were confined principally to the solicitation of stops served by the Dean Milk Company.

(5) *Julius Guy Johnston.* Johnston was employed by the Bowman Company as a retail route salesman from 1944 to 1946. He was acquainted with the owner of a wholesale stop along his route, who was then being served by the Beloit Dairy Company. He asked a Mr. Scanlan, his manager, for permission to serve the stop. Scanlan told him that Bowman had an "agreement" with Beloit, "but you go ahead and serve it for awhile and see what happens." Scanlan said that "We might have to give up another stop equivalent to it in order to keep it." Johnston began serving the stop, served for about a week, and was then told by Scanlan to discontinue service. Scanlan again stated that "we would have to quit serving or give up a stop to Beloit equivalent to that." Johnston suggested to

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the owner that he take milk from another dairy for thirty days; the owner did in fact take milk from the Wanzer company for thirty days, and then resumed Bowman service.

In the latter part of 1945, when one of the witness' stops was solicited by Borden, Mr. Scanlan told the witness: "We have an agreement with Borden, if they take the stop away from us we will get another one in return equivalent to it."

On cross examination, the witness admitted that he was accused of having a "short book" by the Bowman Company after he left that company's employ.

(6) *Raymond Stephens.* Stephens was a solicitor of wholesale accounts for the Borden Company. He was told by a Mr. Creed, his superior, not to comply with requests for service by stops then being served by Bowman, Western-United, Hawthorn-Mellody, and Capitol. According to Stephens, "open competition" consisted of stops served by the Dean Milk Co., Wanzer Dairy Company, and Meadowmoor Dairy Company.

Subsequent to Stephens' employment by Borden, he was a vendor supplied by the Lake Valley Company. After successfully soliciting a stop served by Bowman, he had a conversation with a Mr. Curtin of the Bowman Company, and was told by Curtin to return the stop. He did return the stop, so that Bowman would not "bother" his accounts.

(7) *Sam Parker.* During part of the period embraced by the complaint, Parker was a wholesale foreman employed by the Borden Company. In the fall of 1944, his superior, a Mr. Creed, did not permit him to serve a wholesale stop which was then served by the Bowman Dairy Company.

Each of these witnesses is a former employe of one of the defendants, and each expressed some degree of animosity toward his former employer. Johnston, in particular, was hostile during cross-examination, and as I noted earlier, the Bowman Company had once accused him of dishonesty. The testimony of each of the witnesses is, therefore, open to some suspicion. Assuming arguendo that all of the foregoing testimony is true, however, just what relationship among the defendants is indicated?

There are but three instances of direct communication between alleged conspirators. First, William Horton testified that he returned a stop to Shankman of the Capitol Company, pursuant to orders given by his superior at the Bowman Company. There is testimony to indicate, however, that the owner of the stop was related to Shankman, and that the return of the stop was motivated by respect for that relationship. Second, Sedlak testified that he overheard his superior at Bowman tell Katz of Western-United that Bowman would "get" a Western stop in exchange for a stop which Western had captured from Bowman. This testimony is as consistent with competitive activity as it is with a conspiracy to monopolize. Third, Herbert Horton testified that Hunding asked Bowman not to solicit a stop formerly served by Hunding. This testimony is rendered meaningless by Horton's later assertion that Bowman thereafter successfully solicited the stop.

The testimony does indicate one rough similarity between the actions of Bowman and Borden,

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insofar as Stephens, a Borden solicitor, testified that he was instructed by his superior not to comply with requests for service by stops served by Bowman, Western-United, Hawthorn-Mellody, and Capitol. Three Bowman solicitors testified that they were similarly instructed not to solicit stops served by Borden and certain other dairies. However, the court notes that the instructions which these solicitors said they received are at variance with the terms of the conspiracy alleged in the complaint. One Bowman solicitor and one Borden solicitor testified that they might solicit stops served by Meadowmoor; but Meadowmoor is alleged to be one of the conspirators. One Bowman solicitor testified that he could not solicit stops served by Wanzer, although Wanzer is not alleged to be a conspirator. And I note in passing that witness Rhody, a Hunding employe, testified that Hunding, an alleged conspirator, did in fact capture stops served by other of the alleged conspirators.

B. *Wholesale customers served by the defendants*

The foregoing portion of the record should be considered alongside the correlative testimony of wholesale customers served by the defendants. The government introduced over two dozen witnesses who owned food stores or restaurants in the Chicago area. The testimony of a few of these witnesses corroborates, in a limited way, that of the solicitors employed by the defendants. This corroborative testimony is as follows:

(1) *Richard Myers.* Myers owns and operates a food store in Chicago, and has sold milk supplied

by the Capitol Dairy Co. ever since he opened his store in 1946. A representative of the Borden Company told him that unless he was served by Borden from the first day he opened his store, he could not thereafter switch to Borden's. Myers testified that since he began using the services of Capitol, he has not been solicited by dairies other than the Kraml Co. and the Dean Milk Co.

(2) *Louis J. Pushauer.* Pushauer owns and operates a grocery in Chicago. In 1951, the Dean Milk Co. supplied some of his dairy needs and Hunding Dairy supplied others. During the time he split his orders between Hunding and Dean, a Hawthorne representative came to Pushauer's store and inspected his dairy supplies. The next day Hunding Dairy discontinued service. A similar incident occurred while the witness was later being served by Western-United. The witness further testified that the Borden Co. did not respond when he called for service.

(3) *Michael J. Cozzi.* Cozzi owned a grocery store in Chicago and was served by Meadowmoor Dairy. He moved his store, became dissatisfied with Meadowmoor milk, and accepted Bowman's offer to serve. Meadowmoor thereafter solicited Cozzi's business once again. The Meadowmoor solicitor told Cozzi of a "gentlemen's agreement" among the milk companies not to solicit stops within thirty days after service has been discontinued. The witness was not articulate when speaking of this "agreement." Meadowmoor did begin to serve Cozzi again, although it is not clear at whose instance the change was made.

(4) *Julius Soboleski.* This witness owns a grocery in Chicago, and is served by the Borden Co.

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A Bowman representative told him that Bowman could not serve "as long as I have Borden."

(5) *Philip Bergman.* Bergman owned a grocery in 1947, and was served by the Borden Co. Borden refused a request for financial assistance, and Bergman called Meadowmoor. The Meadowmoor representative said, in the words of the witness, "That he couldn't take the stop over because they had an association with some of the bigger companies not to take stops from each other." The Meadowmoor representative further stated, again in the words of the witness, that "I had to farm out for at least thirty days for a smaller company, and then they would take the stop over." The Meadowmoor representative did not suggest another dairy, but the witness called the Dean Milk Co. After a month of Dean service, Meadowmoor consented to serve.

(6) *Gerald T. Killeen.* Killeen owns a delicatessen in Chicago. At the time he purchased his store, Borden and International Dairy were supplying his milk needs. He desired Ridgeview service, and, after telephoning Ridgeview, a Ridgeview representative came to his store. The Ridgeview representative said, in the words of the witness, that "First he would have to notify those two dairies, and give them a chance to hold the stop." Although the witness called neither Borden nor International, he testified that representatives of both dairies visited him and knew of the contemplated change. The witness switched to Ridgeview anyway, and Ridgeview has been serving him ever since. And, according to the witness, Borden solicited his business even after he changed to Ridgeview. On cross examination, the witness ad-

mitted that he may have told the Borden driver about the intended change.

(7) *Louis Miller.* This witness owns a restaurant in Chicago. While he was served by Hawthorn-Mellody, a Hawthorn representative told him that he could not change to another dairy. A Meadowmoor representative told him that Meadowmoor could not serve because of an "agreement." Subsequently, the witness was served by the Wanzer Co. and the Capitol Co. Throughout his testimony, the witness made clear that he asked each dairy for some sort of financial assistance.

I shall now turn to testimony of other wholesale customers served by the defendants. A small part of this testimony is corroborative of that of solicitors employed by the defendants; another and much larger part of this testimony flatly contradicts that of the solicitors, and another part of this testimony is wholly irrelevant to any of the issues in this case.

(8) *Myer Freedman.* Freedman operates a grocery in Chicago, and receives his milk from the Bowman Co. Since Bowman began to serve, only the Dean Milk Co. has bid for his business.

(9) *Dorothea Wallace.* This witness operates a restaurant in Evanston, Illinois. She was served by Bowman, and became dissatisfied with Bowman service. A representative of Hawthorn-Mellody told her he could not serve her. Afterward, however, the Hawthorn representative made arrangements for the witness' employes to pick up milk from a nearby store served by Hawthorn. This arrangement continued for two or three weeks; afterward, Hawthorn delivered the milk directly to her restaurant.

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On cross examination Mrs. Wallace admitted that she made no effort to contact another dairy.

(10) *Michael Glaser.* Glaser owned a grocery in Chicago, and was served by the Borden Co. When he requested service from Meadowmoor, the Meadowmoor representative told him that Meadowmoor could not serve unless the witness first purchased Wanzer milk for four weeks. The Meadowmoor representative also told the witness, and I quote, "They have an association that they can't put milk in a store by taking a stop away from another stop." On cross examination, the witness stated that it was his impression that there was an association of all the dairies, including the Wanzer Co.

(11) *Andrew D'Alesandro.* This witness formerly owned a restaurant in Chicago. When he first opened his restaurant, he was solicited by representatives of Western-United, Wieland, Borden, and Beloit. He was solicited to the point of annoyance.

(12) *Abraham Wittenberg.* Wittenberg operates a sandwich shop in Chicago, and was originally supplied his milk needs by Western-United Dairy. In 1947, he closed his shop for a few months. While his stop was closed, representatives of Borden, Western-United, Capitol and Meadowmoor bid for his business. He accepted Meadowmoor's offer, and has been served by Meadowmoor ever since.

(13) *Karol Walczak.* Walczak operates a grocery in Chicago. During his ownership of the grocery, many dairies bidded for his business. Among the bidders were Dean, Capitol, Borden, Western-United, and Ogden-Schmitts. Even after he ac-

cepted Capitol's offer and began selling Capitol milk, the dairies continued to bid for his business.

(14) *Chester Ratajczyk.* This witness owns a grocery in Chicago. While he was served by Hawthorn-Mellody, he gave a Hawthorn representative an "ultimatum". Unless Hawthorn gave the witness an ice box within thirty days, the witness would discontinue Hawthorn service. The Hawthorn representative thereupon told the witness of a "working agreement" between dairies, which prevented storekeepers from moving from one dairy to another. The witness interpeted this statement as a "challenge," and began taking milk from the Dean Milk Co.

(15) *Samuel Pritzman.* This witness owns a grocery and meat market in Chicago. While he was served by Western-United, he noted that the Robinson Dairy served a restaurant across the street from his store. He asked the Robinson driver to serve; the driver refused. The witness moved his store in 1949, and discontinued Western-United service. He was then served by Dean and Wanzer for three months, and thereafter by Meadowmoor.

(16) *Martin Biliack.* Biliack owns a grocery in Chicago. While he was served by International Dairy, a representative of Hawthorn-Mellody told him that Hawthorn could not begin service. The Hawthorn representative further stated, in the words of the witness, that "if I took another dairy that was out of the organization, that I would be able to talk business with him . . ."

The witness also testified that he is now served by Hawthorn, and that the Meadowmoor company bid for his business just two weeks ago.

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If any useful purpose could be served by further summarizing testimony of this type, I would do so; but the remaining witnesses add little, if anything, to what has already been repeated. I shall therefore confine my comments to the testimony of the sixteen witnesses recounted above.

Even a cursory reading of this segment of the testimony, much of it pure hearsay at best, reveals glaring inconsistencies. According to some dairy representatives who called upon the storekeepers, certain non-defendant dairies are parties to the objectionable "agreement" or are members of the "association." See, for example, the testimony of witness Biliack. Some of the dairy representatives told some of the storekeepers that they were unable to solicit the business of defendant dairies; it is apparent from the testimony of other storekeepers, however, that the representatives of some defendant dairies did solicit the business of stores served by other defendant dairies. See, for example, the testimony of witnesses D'Alesandro, Wittenberg and Walczak.

This testimony, viewed cumulatively, fails to reveal any consistent pattern of business conduct among the defendants. It does reveal, however, a continuous shuffling of customers between defendants and nondefendants, and between defendants themselves. Such a shuffling is certainly not consonant with the existence of a monopolized market.

C. *The witness Eggleston.*

I shall now turn to the testimony of witness Eggleston. Eggleston is a former officer of and a present stockholder in the Bowman Dairy Company. The government conducted a lengthy ex-

amination of Eggleston as an adverse witness, and, as a result of that examination, discovered only two instances of direct communication between the defendants. The first communication concerns the formation of defendant Ridgeview by Bowman Dairy Company.

The record shows that Eggleston took an active part in negotiations between Bowman and a union of dairy employees. The record also shows that representatives of various dairies often met to discuss labor problems, and that Eggleston represented Bowman at the meetings. At one such meeting, held some time in 1939, Eggleston discussed the formation of Ridgeview with Mr. Baril, and either Mr. Smaha or Mr. Koenig, all of the Borden Company. During this discussion, the Borden representatives told Eggleston that they too were considering the formation of a subsidiary. Eggleston stated, at page 477 of the transcript:

> "I believe I told them that they were going to use Ridgeview strictly as a distributor company and operate it exclusively with vendors in order to meet such competition as Meadowmoor and Lake Valley, and they mentioned at that time that they were considering very seriously of doing something along the same line."

Eggleston further stated, at page 481 of the transcript:

> ". . . the understanding we had was that we would not use Ridgeview to go out and start a price war against the Borden Company, and they said if they went through with the pro-

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position on Belmont that they would use it strictly to fight vendor competition and to meet the vendor competition."

This is the aggregate of the Government's evi-ence concerning this meeting between representa-ves of the two companies. The day after Eg-eston's testimony about the meeting, the Govern-ent cross-examined him at length again, but his ersion of the meeting remained substantially the me, and no new evidence was adduced. See the anscript at pages 523, et. seq.

The court first notes that this is an isolated meet-ng between two of ten alleged conspirators, and hat it took place over twelve years ago. The court ext notes that the discussion between Eggleston nd the Borden representatives took place at a abor negotiation meeting, where, apparently, a ariety of topics were "discussed." And finally, he court notes that Eggleston testified, at page 83 of the transcript, that Bowman did lose stops o the Belmont Company, despite the reported as-surance from Borden that this would not happen.

The next and final instance of direct communica-tion between alleged conspirators, reported by Eg-gleston, concerns a meeting attended by Eggleston and Messrs. Peters and Lipsky of Hawthorn-Mel-lody at the Lake Shore Club in Chicago. The three men discussed a "price war" between Hawthorn and Ridgeview; the discussion lasted 30 or 40 minutes. This, in the words of Eggleston, is the substance of that discussion:

> "We both admitted that we were very foolish for getting into a price war, that neither

> one of us was making any headway; the only one that was benefiting by it was the storekeeper . . . Mr. Lipsky said that they didn't want to sell milk below their cost. And I told them we didn't want to sell milk below our cost . . . If we can get any account at our price, we are going to take it, but it is not our policy to start a price war." (Tr., 545 et seq.)

And this is the aggregate of the government's evidence concerning this second meeting. Here again, the government offers evidence of an isolated meeting between two of ten alleged conspirators; a meeting which took place many years ago.

D. *The witness Heinz*

The final segment of testimony offered by the government to establish the alleged conspiracy is that of the witness Heinz, who spoke of events in 1940 and 1941, while he was manager of the Evanston Branch of the Bowman Dairy Company. Counsel agreed that Heinz's deposition, taken just before the trial, might be used as evidence at the trial.

Heinz testified that he had frequent meetings with Kastner, who was manager of the Evanston Branch of the Borden Company. According to Heinz, these meetings took place in Evanston restaurants about once very two weeks. At the meetings, Heinz goes on, he would "trade stops" with Kastner. That is, each would determine the amount of business he had taken from the other during a given period, and arrange to return a like amount during a subsequent period. Heinz fur-

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ther testified that at the beginning of each school year at Northwestern University, he and Kastner would agree on the price of milk each would serve to fraternities and sororities at that school.

Unfortunately, the court was unable to view Heinz on the witness stand; I would then be in a position to judge his credibility. The court did view Eggleston on the stand. In certain respects, Eggleston's testimony negates the material contained in Heinz's deposition. Since I believe Eggleston was, over all, a truthful witness, and since there is nothing in the record to corroborate Heinz's testimony, I must discount that testimony. It should be noted also that here, again, the Government offers evidence of alleged meetings which took place over twelve years ago between two of ten alleged conspirators.

E. *The witness Newey.*

I shall conclude my review of the oral testimony with a comment upon the government's final witness, Newey. Newey is an attorney. He was employed by McConnell, another attorney, who represented the Dean Milk Co. in a private antitrust suit brought against certain Chicago dairies, including two of the defendant dairies. The *Dean* Case is still pending before another judge of this court.

At McConnell's direction, Newey set out to gather evidence in support of the Dean complaint. Newey set up tape recording devices in a store served by the Dean Milk Co., and, posing as owner of the store, invited solicitation by certain of the defendants. Newey recorded his conversations with each of the solicitors who called at the store.

At an early stage of the trial, the Government attempted to subpoena the recordings from McConnell; this court held, and McConnell urged that it hold, that the recordings constituted a lawyer's work product, and that this court could not therefore order their production for use at the trial.

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Instead of using the recordings at this trial, the government summoned Newey, and asked him to state the substance of each conversation he had with solicitors employed by the defendants. Newey had little, if any, independent recollection of any of the conversations. After each question was asked, he read extensively from transcripts of the recordings and from personal notes based upon those transcripts. His answers were almost all based upon such an extensive reading. In one instance the court noted that Newey read for twenty-two minutes before answering a single question—and this was during direct examination.

I held at the trial, on the basis of *United States* v. *Riccardi,* 174 F. 2d 885 (3 Cir., 1949) and the cases cited therein, that Newey's testimony had little independent probative value, but that the testimony might be admitted for what it is worth. I now hold that the testimony is valueless. It consists, for the most part, of a series of conclusions by Newey, admittedly extracted from the transcripts of the recordings to suit the government's convenience. I shall therefore completely disregard the testimony of witness Newey.

This concludes my review of the oral testimony. I shall now summarize some of the documentary

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evidence offered by the Government to establish the alleged conspiracy.

A. *Sales Committee Minutes*

A major portion of the documentary evidence consists of a series of minutes of meetings of the Sales Committee of the Bowman Dairy Company. Before considering the relevant matter contained in the minutes, I shall comment briefly on the limits of their probative value. First, the subject meetings occurred over a relatively short period of time and more important, during a relatively early period. The earliest meeting which is evidenced by the minutes took place in March 1941; the latest in February 1943. Second, little of what is contained in the minutes represents positive policy or affirmative acts on the part of the Bowman Company; rather, most of the matter contained in the minutes represents informal, sometimes rambling discussion by Bowman officers concerned with a variety of phases of Bowman business. Third, some of the information contained in the minutes is an obvious parroting of gossip gleaned by Bowman employes and others. See, for example, Exhibit 43, which contains a "report from a laundry driver." And the witness Eggleston, who was present at the meetings, testified time and again that much of the matter contained in the minutes was based upon gossip and rumor.

The minutes do have some probative value, however, in that they present an over-all picture of the matters which concerned the persons who directed the sales policies of the Bowman Dairy Company during the years 1941 to 1943. During the trial, the Government extracted bits of material

from each of the minutes, and the government now contends that this extracted material, viewed cumulatively, constitutes evidence tending to prove the alleged conspiracy. The very nature of the Sales Committee minutes makes this effort unrealistic. Nevertheless, I shall review some portions of the minutes which are seemingly consistent with the conspiracy alleged in the complaint. These portions are as follows:

Exhibit 41, dated June 17, 1942:

"(2) Mr. Buthman discussed the Veterans Hospital at Great Lakes and the Great Lakes bid, also Navy Pier and the Hines Hospital."

"(3) Mr. Peck said that he and Mr. Eggleston would plan a meeting with the North Side people early next week."

Exhibit 42, dated August 11, 1942:

"(11) Mr. Buthman discussed with the Committee the milk business at the Great Lakes Naval Training School, Glenview Airport, and Navy Pier. Plans were made for securing our share of this business in the future."

Exhibit 43, dated April 8, 1942:

"(9) Mr. Peck told the Committee that Cream Crest Dairy are a consistent troublemaker on the North Shore with their plugged bottle. He spoke of rumors that they are for sale."

"(19) Mr. Larson asked Mr. Peck to consider the possibility of Ridgeview's submitting a bid for Ft. Sheridan next month. Mr. Peck said he would discuss this with Mr. Rehorst."

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Exhibit 44, dated December 16, 1941:

"(1) Mr. Eggleston told the Committee of a report from Mr. Kettell that Hawthorn-Mellody have instructed their vendors to take business from anybody with no restrictions of any kind."

Exhibit 46, dated October 2, 1941:

"(17) Mr. Larson told the Committee of a conversation with Mr. Ekberg, and passed on a suggestion that Ridgeview's retail routes should be discontinued and the business transferred to Bowman. The loss of $1,100 per month on these routes is not justified, because they do not help us control the price situation as do the store routes."

Exhibit 48, dated October 13, 1942:

"(9) Mr. Peck said that Hawthorn's prices in Highland Park's territory were down to 10¢ a quart to stores. Ridgeview is continuing the fight with Hawthorn."

"(10) Mr. Larson spoke of desperate efforts by Dean to secure independent store business in neighborhoods where National Tea is closing small stores."

Exhibit 49, dated October 20, 1942:

"(4) The Committee discussed the present fight with Hawthorn-Mellody and the score was reported as being approximately two to one in our favor."

Exhibit 50, dated September 16, 1941:

"(15) . . . There is some price cutting in the factory business, and the Committee agreed

to consider a temporary Ridgeview factory route to meet this situation."

Exhibit 59, dated April 29, 1941:

"(12) Mr. Peck told of low Borden prices in the Evanston area, and after some discussion it was decided to ask Mr. Boril and Mr. Koenig of the Borden Company to have lunch with Mr. Eggleston and Mr. Peck next week."

Exhibit 60, dated August 4, 1942:

"(6) Mr. Peck asked the Committee to be certain that all divisions comply fully with the recent memorandum regarding bids on Government business. All such bids are to be sent directly by the Government agency to Mr. Peck at Head Office, and each division is to send a list of such bids and when they are usually received so that any discrepancy can be immediately followed up."

"(16) Mr. Buthman discussed Glenview and Great Lakes and relations with a certain competitor."

Exhibit 71, dated May 19, 1942:

"(11) Mr. Peck told the Committee that Cuneo has not been observing the truce on the North Shore. He said that he had instructed Heinz and Rehorst to call Mr. Peters."

"(22) Mr. Larson reported that Wanzer denied paying 10% on deadbeat collections. Evidently this was merely an excuse by Borden."

Exhibit 83, dated April 28, 1942:

"(14) Mr. Peck told the Committee that Borden's excuse, when asked about saying 10%

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on delinquent collections, was that Wanzer has been doing it for some time."

Exhibit 739, dated July 30, 1942:

"(12) Mr. Buthman reported trouble with Shankman regarding the Hillman store on State Street . . . Goldblatt's across the street are complaining. Mr. Peck asked Mr. Buthman to call Shankman again and try to straighten the situation out."

The paragraphs I have just quoted are a fair representation of those parts of the minutes which the Government claims tend to establish the existence of a conspiracy. During oral argument, counsel for defendant aptly illustrated that many of the paragraphs, when viewed with other evidence adduced at the trial, are as consistent with innocence as with guilt. The court agrees. But the court does not intend to view and to construe each bit of the minutes separately, for each bit becomes meaningless when removed from its text. Each of the minutes must be viewed as a whole, and, so viewed, each is more consistent with a competitive market than with a monopolized market. If the extraction of single paragraphs is at all meaningful, then a series of paragraphs may be constructed which tend to prove that the Bowman Company was concerned with competing, and not conspiring to monopolize. Consider, for example, the following extracts from the minutes:

Exhibit 41, dated June 17, 1942:

"(9) Mr. Larson reported that approximately one-half of Meadowmoor stores in Englewood division are selling at 11½¢.

"(10) Mr. Larson said that factory stores served by Borden, who have the concession system at the New Republic Steel plant, have been unable to displace the two routes we have on the premises because of the support of the Republic Steel employees."

Exhibit 43, dated April 8, 1942:

"(3) Mr. Eggleston told the Committee that Borden's have been furnishing neon signs for some of their stores.

"(6) Mr. Peck told the Committee about a report that Borden's are paying their drivers 10% on all delinquent collections."

Exhibit 49, dated October 20, 1942:

"(12) Mr. Larson mentioned that the 79th Street area has been kicking up again with Capitol Dairy breaking down prices."

Exhibit 51, dated February 17, 1942:

"(3) Mr. Eggleston reviewed with the Committee the competitive situation, with particular reference to Bowman stores that have been split by our competitors using half-gallon bottles. It was agreed to get a list of all such stops and to turn them over to Ridgeview in an effort to serve them with Ridgeview half gallons rather than with the half gallons of the competitors."

"(18) The Committee approved Mr. Larson's request that a space be provided on the new customer memo to indicate the dealer from whom the business was taken. Such a space was formerly provided, but in the reprinting it had been eliminated."

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Exhibit 52, dated July 15, 1941:

"(3) Mr. Eggleston asked about the raise in pint prices, and reports were favorable from our entire territory with the exception of North Chicago, where competition for factory business makes it impossible to put the raises in effect at this time."

Exhibit 55, dated November 18, 1941:

"(9) Mr. Peck told the Committee about information received by Mr. Heinz that the Borden Co. is transferring all routes south of Howard and west of Cicero from Evanston to Chicago divisions. . . . According to reports we have received, there is a great deal of dissatisfaction among Borden employees at this time."

Exhibit 70, dated February 4, 1942:

"(1) Mr. Eggleston suggested that all divisions be asked to compile a list of stores that quit them, and new stops that they acquire at the end of each month, showing the number of points involved in each case, and the competition to whom or from whom the stop was transferred. The Committee agreed.

"(4) Mr. Peck said that Hawthorn-Mellody had been bothering the Moraine Hotel in Highland Park with low prices, but stated that we would hold the business."

Exhibit 71, dated May 19, 1942:

"(28) One of Meadowmoor's recent offers to a Bowman store included the following: 10½¢ price, neon signs, cash, free hand bills,

a free post card mailing, and a bargain cream deal."

Exhibit 79, dated March 11, 1942:

"(17) Mr. Eggleston told of a rumor from New York that Borden has a contract to serve all the A&P stores in Cook County. The Committee agreed to have divisions get names and addresses of all Borden independent stores, and to star the names of good prospects, but to do no soliciting now."

These paragraphs from the minutes tell about a group of men who are very much concerned with competition. These paragraphs reveal the distrust of a competitor, rather than the trust of a conspirator. These paragraphs, standing alone, are as consistent with competition as the other paragraphs, standing alone, are consistent with a conspiracy to monopolize. But as I stated earlier, it is unreal to view any of the paragraphs alone; the minutes must be viewed as a whole. And, after a careful appraisal of the hundreds of pages which form the minutes, I am of the opinion that they do not tend to show that Bowman conspired to monopolize sales of fluid milk to wholesale purchasers.

B. *Other documents.*

The government introduced a variety of other documentary material, which, it contends, tends to establish the existence of the alleged conspiracy. This documentary material is marked by the absence of inter-company correspondence. It is marked by the absence of any reference to any in-

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ter-company agreement. It is marked by the absence of any reference to any inter-company understanding of any sort. Indeed, the court is more impressed with what the documents fail to show rather than that which the documents show.

The court has carefully reviewed and considered each of the documents offered by the Government. Many of the documents are wholly irrelevant to any of the issues of this case. See, for example, Exhibit 37, which is a letter from one Bowman official to another, typewritten on the stationery of the Bowman Dairy Company. The author of the letter first refers to "employees who are not buying our products directly." He then goes on to state:

> "Vernon Buehl, 1718 W. 61st Street, is a single man and lives with his parents in the rear of a small store at this location. This is a Borden stop, as we understand, and they have been trying to change for some time but apparently without success. We believe you know more about this situation than we do, so that account would be entirely in your hands."

The Government introduces this as independent proof of an alleged conspiracy.

Other documents, seemingly consistent with an allocation of customers among the defendants, were explained credibly and rationally by Government witnesses at the trial. The explanations demonstrated, at least to the Court, that the documents did not tend to prove the existence of a con-

spiracy. See, for example, Exhibit 16, which is a letter on the stationery of the Bowman Company and signed by a Bowman official. The letter contains the following language:

> "The following is a list of parochial schools in your territory which did not operate under the penny milk program last year. The penny milk program is available to all parochial schools this year and they may give the business to any dairy they wish. Schools served on the penny milk program last year must retain the same dairy they had."

Metzger, who signed the letter, testified (Tr. 324) that the head of the School Board had requested the dairies not to solicit those schools which had operated under the "penny milk" program the previous year, and that Exhibit 16 was written to comply with that request. The explanation is simple, and it is consistent with the language of the letter. Similar explanations were offered for other documents; the court need not repeat all of them at this time. It is true that some of the material in the documents may have more than one meaning; and, if the court assumes the existence of a conspiracy, the meaning offered by the Government is certainly proper. But I cannot make such an assumption. I must first search the documents to determine whether they tend to show an agreement among the defendants, or at least permit a reasonable inference of such agreement. I find neither agreement nor implication of agreement.

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VIDENCE TENDING TO PROVE THE EXISTENCE OF A CONSPIRACY TO ALLOCATE THE FLUID MILK BUSINESS OF CERTAIN PUBLIC INSTITUTIONS.

It is charged in paragraph 44 of the complaint hat "the defendants have allocated or attempted o allocate among themselves the sales of fluid ilk to public institutions in the Chicago area and ts vicinity by means of a scheme involving the se of prearranged, bogus and collusive bids." It s charged that such bids were made to one munici- al institution (Chicago Municipal Tuberculosis Sanitarium), four Cook County institutions, (County Jail; Juvenile Detention Home; County Hospital; and Oak Forest Infirmary), and five Federal military installations (Vaughan General Hospital, Hines, Illinois; United States Naval Training Station, Great Lakes, Illinois, United States Naval Training School, Chicago, Illinois; United States Marine Hospital, Chicago, Illinois; and United States Army, Fort Sheridan, Illinois).

During oral argument, counsel for the Government stated that the alleged allocation of the milk requirements of these public institutions among the defendants was part of the over-all conspiracy charged in the complaint; and paragraph 27 of the complaint specifically lists the submission of prearranged bids and the allocation of the business of these institutions as part of the terms of the alleged over-all conspiracy.

The Government relies mainly upon documentary evidence to establish this particular section of the alleged conspiracy. There is some testimony in the record which the Government contends does help establish this part of its case, how-

ever, and before commenting upon the documentary evidence, I shall summarize that testimony.

Albert Bello testified that during the years 1941 through 1945, he owned the Bello Dairy in Chicago Heights, Illinois. He successfully bid for the milk requirements of the Oak Forest Infirmary in the second quarter of 1942. While the county was still indebted to him for milk supplied during that quarter, Messrs. Shankman and Fried of Capitol Dairy Company told him that the county would pay its debt only if he stopped bidding for the Infirmary business. Bello did not yield to Capitol during this conversation, but he did later. Bello's testimony indicates that he subsequently refrained from bidding for the Infirmary business. Bello further testified that representatives of the various dairies stood near each other just prior to the bidding at the County Building.

Hans Moser's testimony concerned the Beloit Dairy Company. Moser, who is vice-president of the Lake Valley Farm Products, stated that after he had successfully bid for the business of the Municipal Tuberculosis Sanitarium, Mr. McGuire of Beloit Dairy called him, and said that Beloit and Hawthorn-Mellody handled the Sanitarium business. McGuire threatened to actively solicit Moser's accounts if Moser continued to bid, and, according to Moser, McGuire did thereafter actively solicit his accounts. John K. McVeigh's testimony contains much the same material with reference to Beloit Dairy Company.

Patrick Cunningham, who is president of Cunningham Farms, testified that after he had successfully bid for the milk requirements of the County Hospital, Mr. Kettell of the Bowman Com-

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pany censured him for encroaching on a Bowman account. He also testified as to collusive bidding with reference to the school milk program. Cunningham's testimony further indicates that after he successfully bid for the requirements of the Municipal Tuberculosis Sanitarium, Mr. McGuire of Beloit Dairy Company threatened to capture Cunningham accounts. Beloit thereafter took the Home for Incurables, a large account, away from Cunningham.

This testimony establishes the occurrence of four similar incidents. Each incident involves the action taken by one defendant dairy when another dairy attempted to capture an account. Beloit, for example, looked upon the Sanitarium as "its account;" and Beloit became aggressive when another dairy bid for Beloit business. The court holds however, as it must, that these four isolated instances cannot establish the existence of a conspiracy among ten defendant dairies.

I turn now to the documentary evidence relating to this part of the alleged conspiracy. Exhibits one through eleven (Schedule VIII through XVIII of the Pre-trial Order) are tabulations of bids made by dairies for the milk requirements of the aforementioned public institutions. Each exhibit sets out all bids made at a given institution for a period of about ten years, and denotes awards made by the institution for each bid period. The basic documents from which these tabulations were made are not in evidence, but they have been available for inspection by counsel throughout the pre-trial conference and the trial.

The Government asks the court to draw certain inferences from the material shown in Exhibits

one through eleven. The exhibits show, for example, that particular defendants have repeatedly submitted low bids to particular institutions. This, says the Government, is a basis for inferring that there was repeated collusion among all the defendants. During oral argument, the Government spoke about patterns in the bidding, and illustrated, through colored charts, what is shown in Exhibits one through eleven: that certain defendants were alternately successful in bidding for the business of certain institutions. This, says the Government, is a basis for inferring that some of the defendants shared the business of certain institutions by agreement. Exhibits one through eleven show that defendants Belmont, Meadowmoor, and Hunding never bid for the milk business of any of the eleven institutions. This, says the Government, is a basis for inferring that these defendants agreed to refrain from bidding.

The Government also points out that in some instances certain defendants submitted different bids to two different institutions, although the two institutions appeared on one bid form. Defendants answer that this was done by nondefendant dairies too.

The Government showed during oral argument that in some instances, a defendant submitted a bid which was higher than that submitted by another defendant which bid successfully the preceding bid period. This, says the Government, is a basis for inferring collusion. Defendants answer by demonstrating that in each of Exhibits one through eleven, there are instances of nondefend-

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ants who submitted bids which were higher than that submitted by a defendant which bid successfully the preceding bid period.

This court is frank to admit that it is unwilling to draw any inferences on the basis of Exhibits one through eleven. These exhibits demonstrate nothing more than a disposition on the part of certain defendants to bid for the milk requirements of particular public institutions.

The Government has introduced other documents which, it contends, tend to prove a conspiracy to allocate the milk requirements of these public institutions. A major portion of these consists of the minutes of the Sales Committee meetings; I commented fully upon these minutes in an earlier part of this memorandum. I have reviewed all the other documents relevant to this segment of the conspiracy, and I have found that the Government cannot ground its case upon them.

This completes the court's review of all the evidence relevant to the alleged violations of the Sherman Act. Needless to state, there is no direct evidence of an agreement or understanding among the defendants. There is no evidence of intercorporate communications or of significant meetings between alleged conspirators, although the evidence purports to cover a period of over twelve years. The Government must rely, then, upon inferences drawn from the conduct of the defendants. This court is aware that such inferences, when properly drawn, may support a finding that there was, in fact, an agreement. In *Interstate Circuit* v. *United States*, 306 U. S. 208, 226-7, the Court made clear that an agreement is not a pre-

requisite to an unlawful conspiracy. The Court went on to state:

> "It is elementary that an unlawful conspiracy may be and often is formed without simultaneous action or agreement on the part of the conspirators . . . Acceptance by competitors, without previous agreement, of an invitation to participate in a plan, the necessary consequences of which, if carried out, is restraint of interstate commerce, is sufficient to establish an unlawful conspiracy under the Sherman Act."

However, in order to bring its case within the doctrine set forth in *Interstate Circuit,* the Government must establish parallel conduct on the part of each of the alleged conspirators.

There is evidence which tends to prove that some of the alleged conspirators, particularly Bowman and Borden, engaged in similar courses of conduct in one respect, Bowman and Borden refrained from actively soliciting each other's accounts. Instead, the evidence now before the Court tends to prove that each channelled its solicitation efforts toward new accounts, and toward accounts served by the Dean Milk Company. From such similar conduct, may this court properly infer that those defendants were participants in some plan?

Reasonable businessmen will act similarly when presented with the same problem. This record shows that Bowman and Borden, and every other major dairy in the Chicago area for that matter, were presented with the same problem—the advent of the Dean Milk Co. This record further shows

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that Bowman and Borden repeatedly lost accounts to the Dean Milk Co. Bowman and Borden each instructed its solicitors to attempt to recapture accounts lost to Dean. If Bowman and Borden agreed to do this in concert, they have certainly run afoul of the antitrust laws; but there is no evidence to indicate that Bowman and Borden did act in concert. The Government merely demonstrates that Bowman and Borden acted similarly, and asks this Court to infer a concert of action. I cannot in good conscience draw such an inference. There is testimony in the record to indicate that Bowman and Borden each acted reasonably under the circumstances; this Court cannot and will not presume bad motives.

The Government must present independent evidence to prove that the defendants were participants in a plan. Thus far, the Government has failed to present such evidence. I must therefore hold that the defendants were not parties to an agreement or understanding as alleged in the complaint.

Counsel for the Government correctly stated during oral argument that the Government's cause of action under Section 2 of the Sherman Act presupposes a finding that there was an unlawful agreement among the defendants. If the defendants are considered collectively, they certainly do monopolize the market defined in the complaint; but for the reasons stated, the defendants may not be considered collectively. And, as the evidence shows, no single defendant exercises monopoly power over the market defined in the complaint.

The motion of each defendant to dismiss that part of the complaint which charges violation of

Sections 1 and 2 of the Sherman Act must be granted.

The Court shall now consider the alleged violations of Section 2(a) of the Clayton Act, as amended, 15 U.S.C.A. Sec. 13(a). That Section prohibits certain discriminations in price between purchasers of commodities of like grade and quality. This Court has held that in a suit brought under Section 2(e) of the Clayton Act, the plaintiff must affirmatively establish the occurrence of two sales; and that unless two sales are shown, the plaintiff cannot prove the alleged discrimination. *Chicago Seating Co.* v. *S. Karpen & Bros.*, 83 F. Supp. 409 (1949). That construction of Section 2(e) was upheld by the Court of Appeals, 177 F. 2d 863. Further, the Court of Appeals recognized in its opinion that Section 2(a) should be similarly construed. In the instant case, the Government has proved the occurrence of only one sale by the Beloit Dairy Company; that was the sale of certain dairy products to the Eitel Restaurant in Chicago in 1947. (Exhibit 738). With respect to Beloit Dairy Company, therefore, the Government has not shown a right to relief under Section 2(a) of the Clayton Act. Beloit's motion to dismiss the complaint must therefore be granted in its entirety.

I turn next to the charges made against Bowman and Borden under Section 2(a). It is the opinion of the Court that the Government has shown that Bowman and Borden each has, in past years, discriminated among its purchasers. The evidence relevant to such discriminations is conflicting, and there is much material in the record which tends to show that Bowman and Borden each has some available affirmative defenses. However, at this stage of

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the case, the court cannot pass on the merits of those defenses. Ordinarily, then, this Court would hold that Bowman and Borden each has the burden of establishing that the alleged discriminations come within the score of certain statutory exceptions.

There is one factor which compels this Court to hold that neither Bowman nor Borden need assume that burden. That factor is the decree which was entered by another judge of this court in the case of *Dean Milk Co. v. American Processing and Sales Co., et al.*, 49 C 1159, on December 3, 1952. Bowman and Borden were both defendants in that case, and both are subject to the terms of that decree. Since Belmont is a subsidiary of Borden, and since Ridgeview is a subsidiary of Bowman, those two defendants are also subject to the terms of the Dean decree.

In the instant case, the Government has asked, in paragraph 10 of its prayer for relief:

> "That defendants, jointly and severally, be perpetually enjoined from, in any manner, offering or giving to any existing or prospective wholesale customer any preferential or discriminatory price, discount, rebate, lump sum cash payment, installment cash sum, interest free loan or other gratuity."

In Section VII of the Dean decree, Bowman and Borden, and their respective subsidiaries are perpetually enjoined from:

> "(a) except as permitted pursuant to the provisions of Paragraphs VII(e) or XI hereof, obtaining or attempting to obtain or to

retain all or any part of the fluid milk business of any store customer by means of:

(1) any gift, payment or loan of any property of value made subsequent to December 1, 1952, exclusive of advertising media, and including, but not limiting the generality of the foregoing, gifts, payments, loans or any offers of gifts, payments, loans of money, merchandise, fixtures, or equipment;

(2) except on a proportionately equal basis, services or facilities or offers thereof;

(3) extension of credit beyond thirty (30) days;

(4) arranging or facilitating or offering to arrange or facilitate through accommodation endorsements, guaranties or other use of credit the obtaining or retaining of loans or credit from others;

(b) charging or offering to charge different store customers or prospective store customers different prices for fluid milk, except as permitted pursuant to the provisions of Paragraphs VII(e) or XI hereof;

(c) giving or paying or offering to give or to pay rebates, commissions, discounts, or allowances to different store customers or prospective store customers in connection with purchases of fluid milk, except as permitted pursuant to the provisions of Paragraphs VII(e) or XI hereof;

(d) giving or paying or offering to give or to pay a store customer, in connection with his purchases of fluid milk, rebates, commissions, discounts or allowances computed on the basis

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of a percentage of the out-of-store prices at which such fluid milk is sold.

(e) Nothing contained in this decree shall be construed to prevent a party to this decree from classifying its store customers on the basis of the volume of purchases by said customers and from giving to each such class of customers such price discounts as are justified by differences in the cost of selling and delivering to the said respective classes of customers, or as may be otherwise permitted by law; or from entering into or continuing in force and effect any contract giving effect to any such classification, or as may be otherwise permitted by law."

Section XI, referred to at points throughout Section VII merely provides that: "Nothing contained herein shall be construed to prevent a party to this decree from meeting the competitive offers, practices, prices or discounts of competitors insofar as it is lawful so to do, or from collecting any monies or other property lawfully due now or hereafter from any customer."

Thus, the terms of Section VII of the Dean decree clearly enjoin Bowman, Borden, Ridgeview and Belmont from performing all acts which the Government has specified in paragraph 10 of its prayer for relief.

A decree of this court entered at the instance of a private litigant is as binding upon a defendant as a decree entered at the instance of the Government; and a consent decree, entered by any judge of this court without hearing evidence, is as binding as a decree entered by another judge after a protracted

trial. I conclude, therefore, that each of the remaining defendants is now effectively enjoined by this court from performing any of the acts set forth in the Government's prayer for injunctive relief, insofar as the Clayton Act is concerned.

As a court of equity, I will not perform a useless task. The violations of the Clayton Act described in the complaint and shown at the trial are, for the most part, old violations. And to this court, the Dean decree assures, as completely as any decree can assure, that there will be no new violations.

For the foregoing reasons, the motions of defendants Bowman, Borden, Ridgeview, and Belmont to dismiss that part of the complaint which alleges violations of Section 2(a) of the Clayton Act must be granted.

I am convinced that this suit insofar as it charges Sherman Act violations should not have been filed. The Government began its investigation of this phase of the milk industry in Chicago in 1947, and has had six years to gather evidence in support of the charges in its complaint; yet this court now holds, as it must, that such evidence has not been gathered. I have deliberately reviewed the record in a manner most favorable to the Government, and have found its case to be utterly lacking in substance. The Government thought it necessary to subpoena counsel for the Dean Milk Company at an early stage of this trial, and sought the production of material he had prepared for the Dean litigation. This court then had to balance an attorney's right to the privacy of his work product against the right of the Government to amass evidence for trial. This was an unpleasant dispute, and a dispute which should not have been presented

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this court. It is also apparent that a portion of
e Government's evidence was scraped together
ıring the trial. Many of the Government's wit-
esses were contacted and interviewed after the
ial had begun, and some of them offered no
elevant testimony whatever during examination.
hese factors leave little room for doubt, at least in
ıe mind of the Court, as to the quantum of evi-
ence in the hands of the Government at the time
is complaint was filed.

These observations raise important and trouble-
ome questions. The calendar of this court has
een and remains congested beyond belief; and
ntitrust litigation of this sort doubles the conges-
on. I recognize that I have an obligation to hear
nd to determine antitrust suits brought by the
overnment; I stated at another stage of these
roceedings that I also recognize that Government
ntitrust suits should be expedited whenever possi-
le. I recognize even more fully, however, and the
ntitrust Division should recognize, that I have
ther compelling obligations to other litigants.
ndigent persons accused of crimes, plaintiffs who
omplain of serious personal injuries, inmates of
enal institutions who seek hearings on petitions of
abeas corpus—all these and others also have a
ight to be heard, and to be heard quickly. Yet
hey must stand aside during long antitrust litiga-
ion. It is therefore imperative that some *respon-
ible* agent of the Government appraise these pro-
racted cases before they are brought into court.
A lawyer's appraisal of the evidence in this case
vould have revealed the weakness I speak about
oday. Certainly, the Antitrust Division suspects
vrongdoing in the milk industry; but a case cannot

be built upon suspicions. As a court, I must ask for evidence; and the Antitrust Division should have substantial evidence, based upon its own investigations, before it comes to court. A careful appraisal of the Government's evidence should have been made by some person in the Antitrust Division long ago; and the obvious absence of such an appraisal casts serious and unpleasant reflections on the motives of the Antitrust Division in bringing this suit. Counsel for the defendants remarked some time ago that this litigation was nothing more than a fishing expedition, an expedition to glean evidence for the prosecution of a companion criminal case pending before another judge of this Court. I feel compelled to comment that the remark has to some extent been justified by my review of this month's record.

These remarks are certainly not directed toward Government counsel who are assigned to the trial of this case. Each of Government counsel, under the fine direction of Mr. Jinkinson, has rendered an excellent performance. Government counsel were simply not supplied with the evidence necessary for success in this Court; but they performed splendidly with the little evidence they had.

For the reasons stated in this memorandum the motion of each defendant to dismiss the complaint is granted in its entirety, and, accordingly, the complaint is dismissed.

In accordance with the provisions of Rule 52(a), counsel for the defendants may prepare and file with the Court, in writing, within fifteen days from the date hereof, proposed findings of fact, conclusions of law, and a draft of a proposed order of

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ismissal, consistent with the views herein ex-
ressed, delivering copies thereof to counsel for
ie plaintiff. Within fifteen days of the receipt of
uch copies, counsel for the plaintiff may prepare
nd file with the Court, in writing, their observa-
ions with reference thereto and suggestions for
he modification thereof, delivering a copy of such
bservations and suggestions to counsel for the de-
endants. Within ten days thereafter, counsel for
he defendants may present to the court, in writ-
ng, their reply to such observations and sugges-
ions. Whereupon, the matter of making findings
f fact, conclusions of law and order of dismissal
erein will be taken by the court without further
rgument.

It is so ordered.

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In the Supreme Court of the United States

OCTOBER TERM, 1953

No. —

UNITED STATES OF AMERICA, APPELLANT

v.

THE BORDEN COMPANY, ET AL.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF ILLINOIS

APPELLANT'S BRIEF IN OPPOSITION TO APPELLEES' MOTION TO DISMISS OR AFFIRM, AND TO THE SEPARATE MOTION OF APPELLEE BELOIT DAIRY COMPANY

Various statements made in appellees' motion to dismiss or affirm are, in the view of the Government, incomplete or misleading. In challenging such statements in this brief, we necessarily make somewhat detailed reference to the proceedings below. We also answer appellee Beloit Dairy Company's separate motion to dismiss or affirm.

I. The Eggleston Deposition

The district court did not permit the Government to use Eggleston's deposition in examination of this

hostile witness. Appellees do not contend that use of the deposition, after it had been unsealed, was correctly barred, but they contend, in effect, that the ruling was harmless error. The grounds given for this conclusion are that: (1) "much" of the deposition was consistent with Eggleston's trial testimony, (2) it largely dealt with incidents occurring prior to the 1940 cut-off date fixed by a pretrial order, and (3) it duplicated material used by the Government in an effort to impeach.

We submit that the Government was prejudiced when it was not permitted to show discrepancies between the deposition and trial testimony which were calculated to impair Eggleston's credibility. In this connection, it is immaterial that the deposition dealt with some incidents which the trial testimony does not cover, or that parts of the deposition may be consistent with Eggleston's trial testimony. As to appellees' suggestion that there was available to the Government material which "duplicates" the Eggleston deposition, we deny that this was the case. The Eggleston affidavit, to which appellees refer, was merely a summary statement of the general facts covered by the deposition. It does not contain the specific, detailed facts found in the deposition, concerning which Eggleston was questioned at the trial.

Examples of contradictions between Eggleston's deposition and his trial testimony, which the Government was not permitted to show, are set forth below:

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(a) At the trial Eggleston, a former officer of Bowman, was asked about a price war between Bowman's fighting subsidiary, Ridgeview, and a competitor (Hawthorn). In his deposition Eggleston had testified (Offer of Proof filed March 10, 1953, p. 10):

> We had men follow behind their (Hawthorn's) trucks and get the names and addresses of their stores and we turned them over to Ridgeview and they sent solicitors in there; and we sold milk as low as five cents a quart off the Ridgeview trucks and—
>
> Q. Then what happened?
>
> A. And Hawthorn was forced to meet that price on a number of accounts.

At the trial, however, Eggleston testified that Ridgeview met Hawthorn's prices where "necessary to hold our business" and that "at no time did we go below their prices" (Tr. 542-3).

(b) In his deposition Eggleston testified that he made an agreement with Hawthorn's representative that "we [Ridgeview] would not take any more of their accounts" and "they wouldn't take any more of our accounts" (Offer of Proof, *supra*, p. 11). But at the trial, when asked whether the parties had said anything about not soliciting each other's accounts, his answer was (Tr. 548): "I told them we were not going to allow our men to go out and solicit their accounts and cut our price."

(c) In his deposition Eggleston testified that, during the time he was with Bowman, Ridgeview

was not operated at a profit and that Bowman "absorbed the loss of that company" (Offer of Proof, *supra*, p. 7). But when asked at the trial whether Ridgeview was operated at a loss, he replied: "That I wouldn't know. I had nothing to do with the financial statements" (Tr. 483).

II. The Newey Tape Recordings

Appellees have not answered the Government's contention that the district court erred when it ruled that the tape recordings which the Government sought to put in evidence were within the privilege accorded to the "work product" of a lawyer.[1] But appellees contend that the Government did not offer the tapes or a transcript thereof in evidence and "presumably chose to rely upon the testimony of witness Newey." However, as we show below, the Government did seek to have the tapes received as evidence and, only after the court had rejected such evidence, did it introduce Newey as a witness.[2]

Subsequent to the ruling that McConnell need not produce the tapes in response to the Government's subpoena, Government counsel advised the court

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[1] Appellees' reference to Judge Igoe's ruling in the *Dean* case is entirely inapposite. In that case, but not here, the tapes were material which a lawyer had in his possession preparatory to trial of the cause for which the material had been obtained, and in that case, but not here, it was counsel for an adverse party who sought production.

[2] The court's ultimate ruling rejecting all of Newey's testimony upon the grounds that it was not based on present recollection and did not constitute "past recollection" recorded underlines the injury to the Government resulting from the erroneous ruling rejecting the recordings.

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that it had subpoenaed Newey as a witness and that Newey had the tapes in his possession and was refreshing his recollection by examining them. Government counsel then said (Tr. 2211):

> It is a question of whether or not this court is going to hear those tapes, and if the Court is going to hear them the government, of course, would like to have permission from the court to set up in the court room the necessary equipment so that the tapes can be played.

The court thereupon asked if McConnell was waiving his privilege, and Government counsel handed to the court the letter from McConnell authorizing Newey to submit the tapes to the defendants and to the Government for their use in this case "if the Court sees fit to require you to do so." The court, after reading this letter, again ruled against admitting the tapes in evidence, saying that "the ruling made at the time Mr. McConnell asked for it still stands," and that there "is no use of producing the tape recordings here" (Tr. 2212-3).

Appellees further contend, that since the Government made no offer of proof with respect to the tapes, it may not, on appeal, urge reversible error respecting rejection of this evidence.[3] However, the law is clear that a formal offer of proof is not

---

[3] Appellees cite *Herencia* v. *Guzman*, 219 U.S. 44, 46, in support of this proposition, but that case merely holds that a judgment will not be set aside upon the ground of erroneous exclusion of evidence if the record does not disclose what was the nature or significance of the excluded testimony.

essential to preserve the question of erroneous exclusion of evidence if it is clear from the record as a whole what was the nature of the excluded testimony. *Hoffman* v. *Palmer,* 129 F. 2d 976, 994 (C.A. 2, 1952), 318 U.S. 109; *Maguire* v. *Federal Crop Ins. Corp.,* 181 F. 2d 320, 321-322 (C.A. 5, 1950); *Meaney* v. *United States,* 112 F. 2d 538, 539 (C.A. 2, 1940).

Since Newey's testimony, which covered some 139 pages of transcript (Tr. 2228-2367), identifies and describes the conversations which the tapes had recorded, the record fully discloses the character and contents of the rejected evidence. Moreover, McConnell, the attorney for the plaintiff in the private antitrust suit who had possession of the tapes, testified as follows as to what they involved (Tr. 168-9):

> He was an employee of mine, your Honor, and I put him to work in a grocery store taking tape recordings of what went on between the grocery owners and the different solicitors from the different dairies, and they are tape recordings of those conversations.

The appellees appear to urge that the probative value of the tapes must be heavily discounted because only one of the dairy salesmen whose conversations are recorded was a representative of an appellee.[4] However, all the salesmen in question represented companies charged as having conspired

[4] The tapes record a conversation with a Borden salesman (Tr. 2253-4), but none with a Bowman representative, and the Government therefore corrects the statement made in its jurisdictional statement that conversations with representatives of both of these companies were recorded.

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with the present appellees to violate the Sherman Act.[5] Admissions by agents of these defendants are clearly admissible against their co-conspirators, the present appellees.

III. The Illinois Dead Man's Statute

Appellees do not attempt to show that the district court correctly applied the statute, but urge as a defense that the Government did not assign the right reason for its objection to the court's ruling. However that may be when this matter came up during the first day of trial (Tr. 29), the court refused to allow Government counsel to state the ground of his objection when exclusion of evidence on the basis of the dead man's statute arose on the fifth day of trial. The following then transpired (Tr. 769-70):

> The COURT: The objection is sustained.
>
> Mr. JINKINSON: Your Honor, this is the first time, I think, that we have a clear-cut issue in reference to the dead man's statute since it came up the first time. Since that time we briefed the law; I would like to be heard on it.
>
> The COURT: The ruling will stand. Proceed.

Manifestly, appellees cannot rely upon failure by the Government to state the correct grounds for objection to the court's exclusion of evidence when

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[5] The tapes record conversations by, among others, Kost of American Processing and Sales Co. (Tr. 2234); Galnick of Capitol Dairy Co. (Tr. 2266); Chernow of Western United Dairy Co. (Tr. 2272) and Boysen of Hunding Dairy Co. (Tr. 2283-2284). These companies were all named defendants in the Government's complaint, and have entered into a consent decree with the Government enjoining them from further violating the antitrust laws.

the Government was denied opportunity to state the grounds of its objection.

IV. Dismissal of Charges of Clayton Act Violation

Appellees indicate that the court below dismissed the charges of violating Section 2 of the Clayton Act, not because it regarded the decree entered in the private antitrust litigation as rendering relief of this kind unnecessary, but because it saw no danger of further violation of Section 2. Appellees accordingly contend that this aspect of the case is controlled by *United States* v. *W. T. Grant Co.*, 345 U.S. 629, where it was held that the question whether there is "some cognizable danger of recurrent violation" involves an exercise of judicial discretion, which will be reversed only on a strong showing of abuse.

The district court, in the opinion which it rendered, said that there is "one factor" which compelled it to hold that Borden and Bowman need not defend against the Clayton Act charge, and that that factor was the judgment entered in the *Dean* case. Later in the opinion the court said that the *Dean* decree "assures, as completely as any decree can assure, that there will be no new violations." That the district court acted primarily on the basis of this judgment is shown by its rejection of an additional conclusion of law proposed by appellees Bowman and Ridgeview which, as they asserted, was based upon and reflected the decision of the Supreme Court in the *Grant* case (Bowman and Ridgeview Motion to Amend, filed June 29, 1953, pp. 2-3). The additional conclusion of law, which the court did not adopt, reads:

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> Before exercising its power to grant injunctive relief, the Court must determine that there exists some cognizable danger of recurrent violations of law. Proof of past violations of the Clayton Act is not in itself sufficient to warrant the granting of injunctive relief if there is no significant threat of future violation.

We submit that the issue raised by the Government's appeal, whether entry of judgment in a private antitrust action may deprive the Government of its right to obtain a similar decree in its own action, is squarely presented by the appeal in this case, and is not answered in appellees' motion to affirm.

V. Beloit's Motion To Dismiss or Affirm

Appellee Beloit has moved to dismiss the appeal upon the ground that the Government's motion for a new trial did not toll the running of the appeal time as to Beloit. The question is whether that motion raised "questions of substance" as distinguished from "mere matters of form." *United States* v. *Crescent Amusement Co.*, 323 U.S. 173, 177. The motion for a new trial clearly did raise questions of substance as to the remaining appellees, and they have not questioned that the motion tolled the appeal time as to them. It would seem that a motion for a new trial raising questions of substance as to all but one defendant, should toll the running of the statutory time for appeal as to all the parties, at least when, as here, all the defendants are charged with having conspired together. Any

other conclusion would result in piecemeal appeals, a result opposed to the policy expressed by Congress. See *Roche* v. *Evaporated Milk Assn.*, 319 U.S. 21, 30.

We submit that, in any event, the motion for a new trial did raise questions of substance involving Beloit. The motion attacked the court's pre-trial ruling that evidence relating to pre-1940 incidents would be excluded. Had the court reversed itself on this point, the Government would have been in a position to introduce evidence establishing the origins of the conspiracy as to all of the appellees, including Beloit. While the present appeal does not attack the court's cut-off date ruling, the substantive character of the issues raised by the motion for a new trial must be determined from that motion, not from the later appeal papers.

The motion also attacked the court's exclusion of the Newey tape recordings. These tapes contained a conversation with an agent of another defendant, in which the agent linked Beloit to the conspiracy (Tr. 2238).

For the foregoing reasons, we submit that the motions to dismiss or affirm the appeal should be denied.

Respectfully submitted.

ROBERT L. STERN,
Acting Solicitor General.

NOVEMBER 1953.

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Sherman Act, Act of July 2, 1890, 26 Stat. 209, as amended by the Act of March 3, 1911, 36 Stat. 1167, and by the Act of August 17, 1937, 50 Stat. 693, 15 U. S. C. 1 *et seq.*:
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Sec. 2 3
Sec. 4 3

Illinois Rev. Stat., 1945, C. 51:
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51 Cong. Rec. 16276, 16319	55
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S. Rep. 698, 63d Cong., 2d Sess., pp. 42–50	55
3 Wigmore on *Evidence* (3d Ed.), §§ 792, 798*a* (b)	41
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8 Wigmore on *Evidence* (3d Ed.), §§ 2196, 2327	46

BLEED THROUGH

In the Supreme Court of the United States

OCTOBER TERM, 1953

No. 464

UNITED STATES OF AMERICA, APPELLANT

v.

THE BORDEN COMPANY, ET AL.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF ILLINOIS

BRIEF FOR THE UNITED STATES

OPINION BELOW

The opinion of the district court (R. 80) is reported at 111 F. Supp. 562.

JURISDICTION

The judgment of the district court was entered on July 17, 1953 (R. 125), and a timely petition for a new trial was denied on August 6, 1953 (R. 151). The petition for appeal was presented and allowed on October 2, 1953 (R. 430–431), and probable jurisdiction was noted on December 14, 1953 (R. 443). The jurisdiction of this Court is conferred by Section 2 of the Expediting Act of February 11, 1903, 32 Stat. 823, 15 U. S. C. 29,

as amended by Section 17 of the Act of June 25, 1948, 62 Stat. 869.

QUESTIONS PRESENTED

1. Whether the district court erred in not allowing the Government to use a deposition, taken in another case, of a crucial Government witness who proved hostile, for purposes of impeaching his trial testimony by showing inconsistencies between such testimony and statements in the deposition.

2. Whether the court erred in holding that tape recordings of statements made by various agents of alleged conspirators, which the court excluded, were within the privilege attaching to the "work product" of an attorney, and that such privilege had not been waived.

3. Whether the court properly held inadmissible, under the Illinois "dead man's" statute, testimony as to conversations with a deceased agent of a defendant.

4. Whether the fact that a judgment entered in a private suit enjoined the defendants from selling at discriminatory prices justified the court in refusing to grant the Government similar relief against such conduct.

STATUTES INVOLVED

The pertinent provisions of Sections 1, 2, and 4 of the Act of July 2, 1890, 26 Stat. 209, as amended by the Act of March 3, 1911, 36 Stat. 1167, and by the Act of August 17, 1937, 50 Stat. 693 (15 U. S. C. 1, 2, 4), commonly known as the Sherman Act, are as follows:

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SEC. 1. Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is hereby declared to be illegal: * * *. Every person who shall make any contract or engage in any combination or conspiracy hereby declared to be illegal shall be deemed guilty of a misdemeanor, * * *.

SEC. 2. Every person who shall monopolize, or attempt to monopolize, or combine, or conspire with any other person or persons, to monopolize any part of the trade or commerce among the several States, or with foreign nations, shall be deemed guilty of a misdemeanor, * * *.

* * * * *

SEC. 4. The several district courts of the United States are hereby invested with jurisdiction to prevent and restrain violations of this act; and it shall be the duty of the several district attorneys of the United States, in their respective districts, under the direction of the Attorney General, to institute proceedings in equity to prevent and restrain such violations. * * *

The pertinent provisions of Sections 2 (a) and 15 of the Act of October 15, 1914, 38 Stat. 730, as amended by the Act of June 19, 1936, 49 Stat. 1526 (15 U. S. C. 13 (a), 25), commonly known as the Clayton Act, are as follows:

SEC. 2. (a) That is shall be unlawful for any person engaged in commerce, * * *

> either directly or indirectly, to discriminate in price between different purchasers of commodities of like grade and quality, where either or any of the purchases involved in such discrimination are in commerce * * * and where the effect of such discrimination may be substantially to lessen competition or tend to create a monopoly in any line of commerce, or to injure, destroy, or prevent competition with any person who either grants or knowingly receives the benefit of such discrimination, or with customers of either of them: * * *.
>
> * * * * *
>
> SEC. 15. That the several district courts of the United States are hereby invested with jurisdiction to prevent and restrain violations of this Act, and it shall be the duty of the several district attorneys of the United States, in their respective districts, under the direction of the Attorney General, to institute proceedings in equity to prevent and restrain such violations. * * *

The pertinent provision of Illinois Rev. Stat., 1945, C. 51, § 4, commonly known as the "dead man's" statute, is as follows:

> * * * in every action, suit or proceeding a party to the same who has contracted with an agent of the adverse party—the agent having since died—shall not be a competent witness as to any admission or conversation between himself and such agent * * *.

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STATEMENT

This is a civil proceeding instituted by the United States in June 1951 charging ten Chicago dairies[1] with conspiring to restrain and to monopolize, and with monopolizing, the sale of fluid milk to wholesale customers and certain public institutions in the Chicago area, in violation of Sections 1 and 2 of the Sherman Act, and with price discrimination in violation of Section 2 (a) of the Clayton Act (R. 23).

The complaint charged, *inter alia,* that, since 1940, the defendants had agreed to refrain, and had refrained, from competing for each other's wholesale (i. e., store and restaurant) customers (Pars. 27 (a), 30, 33, 34, R. 30, 32, 33); that defendants Borden and Bowman, the two principal dairies serving the Chicago area, had agreed to organize and operate "fighting" companies to destroy competing nondefendant milk distributors (Par. 27 (e), R. 31); that they had organized and utilized Belmont and Ridgeview, their respective subsidiaries, for that purpose; that, pursuant to their direction, Belmont and Ridgeview had engaged in

[1] The Borden Company (Borden); Bowman Dairy Company (Bowman); Belmont Dairy Company (Belmont), a wholly owned subsidiary of Borden; Ridgeview Farms Dairy, Inc. (Ridgeview), a wholly owned subsidiary of Bowman; Beloit Dairy Company (Beloit); Capitol Dairy Company (Capitol); American Processing and Sales Company, also known as Hawthorn-Mellody (Hawthorn); Hunding Dairy Company (Hunding); Meadowmoor Dairies, Inc. (Meadowmoor); and Western United Dairy Company (Western) (R. 23).

predatory price cutting (Pars. 41–43, R. 36); that the defendants had agreed to divide among themselves the business of selling milk to public institutions in the Chicago area and to fix the prices at which such milk would be sold (Pars. 27 (f), 27 (g), R. 31); that they had submitted collusive bids to such institutions (Par. 44, R. 36); and that they had retaliated against independent wholesale milk distributors who interfered with such allocation arrangements (Par. 45, R. 37).

The complaint also charged (Par. 26, R. 30) that each defendant had, pursuant to the conspiracy and in order to obtain the business of wholesale customers of non-defendant dairies (Par. 30, R. 32), sold milk at discriminatory prices in violation of Section 2 (a) of the Clayton Act, and that such price discriminations, often given secretly, were in the form of preferential prices, discounts, rebates, and other gratuities (Par. 47, R. 38).

After the district court (Judge Campbell) had, over the Government's objection, referred the case to a master for hearing and report, the Government filed in this Court a motion for leave to file a petition for writ of mandamus to require vacation of the order of reference. *United States* v. *United States District Court for the Northern District of Illinois, Eastern Division,* Misc. No. 271, October Term, 1952. Six days after the filing

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of this motion, and prior to any action thereon, Judge Campbell vacated the order of reference.

In February 1953, a consent decree was entered against five of the defendants[2]—all relatively small dairies—enjoining them from continuing conduct of the kind charged against them in the complaint (R. 41). The case against the remaining defendants—Borden and Bowman, Belmont and Ridgeview, their respective subsidiaries, and Beloit, a smaller dairy—went to trial before Judge Campbell early in March. At the close of the Government's case, the defendants moved for dismissal of the action on the ground that the Government had failed to show that it was entitled to relief (R. 66–79, 429).

The district court on March 30, 1953, filed an opinion holding that, while the evidence showed that Borden and Bowman had taken parallel action in certain matters, the evidence that the defendants had acted by agreement and in concert was insufficient to establish conspiracy or combination, the foundation of the charges of Sherman Act violations (R. 107). The court also held that, while the evidence showed that Borden and Bowman each had sold at discriminatory prices,[3] the Government had no right to relief

[2] Capitol, Hawthorn, Hunding, Meadowmoor and Western.

[3] The court found that their subsidiaries, Belmont and Ridgeview, also had sold at discriminatory prices (Fdg. 36, R. 121–122). The court further held that the Government had failed to prove any violations of Section 2 (a) by defendant Beloit (R. 108).

for violation of Section 2 (a) of the Clayton Act because the judgment previously entered against Borden, Bowman and their subsidiaries in a private antitrust suit[4] comprehensively enjoined sales at discriminatory prices (R. 109–110). The court accordingly concluded that the complaint should be dismissed in its entirety as against the defendants who were then before it, the present appellees (R. 112).

The district court subsequently filed findings of facts and conclusions of law (R. 113), and entered judgment of dismissal (R. 175). A timely motion for a new trial was denied (R. 151–152).

THE GOVERNMENT'S EVIDENCE

Since the attack here is not on the court's findings on the record, but on the court's rulings which prevented the Government from establishing its case or misapplied the law to the case made out, there will be no attempt to review in detail all the evidence which the Government introduced to prove its case. The statement merely sets forth such portions of the evidence as are

[4] *Dean Milk Co.* v. *American Processing and Sales Co.*, D. C., N. D. Ill. E. D., No. 49 C. 1159. That suit sought injunctive relief and triple damages on the basis of alleged violations of the Sherman and Clayton Acts similar to those charged in the instant case. The defendants included Borden and Bowman. The case was settled on December 3, 1952, by the entry of a consent decree enjoining the defendants from violating the Sherman and Clayton Acts, and payment by the defendants of a substantial sum of money (R. 109, 160).

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necessary to an understanding of the issues, and to demonstrate the prejudicial effect of the challenged evidentiary rulings. To a large extent, it relies upon the district court's discussion of the evidence.

The Government's evidence consisted of the testimony of more than 50 witnesses—officials, employees, and customers of the defendants, and officials of competing independent dairies—and miscellaneous documentary material, including minutes of sales committee meetings of various defendants, and correspondence. This evidence, in brief, showed that the defendants concertedly refrained from competing for each other's wholesale milk business ("closed competition"), and directed their competitive efforts toward the business held by nondefendant independent dairies ("open competition"), particularly the Dean Milk Co. It further showed that certain defendants had divided among themselves the sale of milk to public institutions.

A number of Bowman and Borden account solicitors testified that they had been instructed by their superiors not to solicit closed competition. Herbert Horton, a Bowman solicitor, was told by a company official that he "wasn't to solicit any stops, such as Wanzer, [H]unding, Beloit, Borden, Western United, Capitol Dairy, and Hawthorne—all the major large ones that was there," and that "open competition was any stops, like these smaller

dairies * * * (R. 86). Another Bowman solicitor, upon going to work, was told that "open competition" was new business, business which was closed and reopened after thirty days, and "cut-rate" dairies, and that he was not to solicit closed competition which included, among others, defendants Borden, Hunding, Capitol, and Western (R. 85). Sedlak, another Bowman solicitor, was told by his superior that he was not to solicit stops like Borden, Capitol, and Western, and he described instances in which his superiors did not permit him to begin serving stops which were then served by Borden or Capitol (R. 85–86).

When Bowman solicitor Johnston sought permission to serve a stop which was served by Beloit, his superior told him that Bowman had an "agreement" with Beloit, but that he should "go ahead and serve it for awhile and see what happens," even though Bowman "might have to give up another stop equivalent to it in order to keep it." After serving the stop for a week, Johnston was directed to discontinue service, since, as he was told, "we would have to quit serving or give up a stop to Beloit equivalent to that" (R. 87). Stephens, a Borden solicitor, was told by his superior not to comply with requests for service at stops then being served by defendants Bowman, Western, Hawthorn, and Capitol (*ibid.*), and a Borden wholesale foreman was not permitted to service a wholesale stop served by Bowman (R. 88).

Food stores and restaurants which were served by one of the defendants were unable to obtain milk directly from another defendant. Such stores which sought service from Meadowmoor were informed that Meadowmoor could not serve them because "they had an association with some of the bigger companies not to take stops from each other" (R. 90 (5)), "because of an 'agreement'" (R. 90 (7)), or because "[t]hey have an association that they can't put milk in a store by taking a stop away from another [dairy]" (R. 91 (10)). A store owner served by Borden was told by a Bowman representative that Bowman could not serve him "as long as I have Borden" (R. 90 (4)); another store owner was told by a Borden representative that he could not switch from Capitol to Borden (R. 89 (1)). A grocery store served by Hawthorn, which threatened to change its patronage unless given an icebox, was informed that there was "a 'working agreement' between dairies, which prevented storekeepers from moving from one dairy to another" (R. 92 (14)).

Customers who wished to switch from one defendant to another sometimes were "farmed out" to an independent dairy ("open competition") for 30 days, thus permitting the acquiring dairy to take over the account while paying lip service to the defendants' understanding not to take each other's business. Thus, a grocery store which Meadowmoor refused to serve because it

was being supplied by Borden was advised that it "had to farm out for at least 30 days for a smaller company, and then they would take the stop over" (R. 90 (5)). After the store had taken milk from the Dean company for a month Meadowmoor consented to serve it (*ibid.*). Another grocer served by Borden similarly was told by Meadowmoor that it could not serve him unless he "first purchased Wanzer [an independent dairy] milk for four weeks" (R. 91 (10)). A restaurant owner who was dissatisfied with Bowman was refused direct service by Hawthorn. However, Hawthorn arranged for the restaurant to pick up its milk at a nearby store which Hawthorn served, and it was only after two or three weeks of this method of delivery that Hawthorn began to deliver milk directly (R. 91 (9)).

Meetings were held at which the defendants reached agreement on various problems arising out of their competitive situation. Charles Heinz, the manager of Bowman's Evanston, Illinois, branch from 1935 to 1945 [5] (R. 357–358) was under instructions during this period that defendants Borden and Beloit were closed competition in his area, and that the open competition, available for solicitation, were the smaller dairies (R. 365–366).[6]

[5] Heinz had been a Bowman employee since 1924, and after leaving Bowman in 1945, was employed by defendant Hawthorn (R. 357).

[6] Heinz's testimony was given in a deposition which, pursuant to agreement among counsel and the court, was read into the record during the trial (R. 356).

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Every two weeks, he met with the manager of Borden's Evanston branch to "trade stops," that is, "each would determine the amount of business he had taken from the other during a given period, and arrange to return a like amount during a subsequent period" (R. 95).[7] And, at the beginning of each school year, these two officials would agree upon the price at which they would sell milk to the fraternities and sororities at Northwestern University (R. *ibid.*).

At the meeting between Bowman and Borden officials, the formation of "fighting" subsidiaries was discussed, and an "understanding" was reached between them that Bowman would not use its fighting company (Ridgeview) "to go out and start a price war" against Borden, and that Borden would use its fighting subsidiary (Belmont) only to fight "vendor competition" (R. 93–94). An actual price war between Ridgeview (Bowman's subsidiary) and Hawthorn (prior to Hawthorn's joining the conspiracy) was settled at a meeting of Bowman and Hawthorn officials

[7] The practice apparently was that when one of the defendants took a stop away from another, the latter would have to give the former a substitute stop in return. Thus, when a Bowman stop was solicited in 1945, a Bowman official stated that "[w]e have an agreement with Borden, if they take the stop away from us we will get another one in return equivalent to it" (R. 87 (5)). On another occasion, a Bowman solicitor overheard his superior tell an official of Western over the telephone: "You know you took one of our stores, don't you?—Do you know what that means?—We have to go out and get one of yours!" (R. 86 (2).)

at which "both admitted that we were very foolish for getting into a price war" from which "the only one that was benefiting * * * was the storekeeper * * *" (R. 94).

The Government also introduced evidence relating to the defendants' division of the business of selling milk to public institutions, and their retaliation against independent dairies who tried to get such business. In a series of meetings held early in 1942 with Eggleston, a Bowman official, Heinz was informed that the milk business of the Great Lakes Naval Training Station and of Fort Sheridan "would be shared on an alternate [quarterly] basis with Borden Dairy Co." (R. 361). Charts and graphs introduced by the Government showed that particular defendants invariably were the successful bidders for certain institutions, that in some cases institutional business was shared alternately by two defendants, and that some defendants submitted different bids to different institutions even though the bids were made simultaneously on the same bid form (R. 105–106).

Independent dairies who bid successfully for the defendants' institutional business were threatened with reprisals. Thus, one dairy owner, after obtaining the contract to supply milk to a county infirmary, was told by officials of defendant Capitol that the county would pay him for the milk which he had furnished under the contract only if he stopped bidding for the busi-

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ness, which he ultimately did (R. 104). Independent dairies which had bid successfully for defendant Beloit's institutional business were, on three different occasions, warned that Beloit would solicit the dairy's customers if such bidding continued, and on at least one of these occasions Beloit thereafter did take away a large account (R. 104–105).[8] On another such occasion, the Beloit official stated that Beloit and Hawthorn usually "handled" the account in question (R. 104).

THE EVIDENCE EXCLUDED BY THE COURT

The Government has assigned error to three evidentiary rulings by the district court which, in its view, collectively denied it a fair opportunity to present its case. These rulings were: (1) refusal to permit the Government to use a deposition, given by the witness Eggleston in a private antitrust suit, to impeach his trial testimony; (2) exclusion of tape recordings of conversations between the witness Newey and agents of five of the original defendants; and (3) exclusion of testimony as to a conversation between a Government witness and a deceased sales manager of Borden.

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[8] An independent dairy which bid on the public school penny milk program was periodically called by a Bowman official before sealed bids were due, informed what Bowman was bidding, and requested to submit an identical bid (R. 354–356).

(1) THE EGGLESTON DEPOSITION

Prior to trial, the Government considered that one of its key witnesses was H. C. Eggleston, a director and sales manager of defendant Bowman during part of the period the alleged conspiracy was operating. In a deposition given in a private antitrust suit (*Dean* case, *supra,* n. 4), to which the Government was not a party, Eggleston had testified as to numerous conspiratorial acts on the part of Borden, Bowman, and other defendants. This deposition had been sealed and the presiding judge in the *Dean* case (Judge Igoe) had denied a Government motion (made prior to the instant trial) to unseal it, on the ground that, under the court rules, depositions could be unsealed only by the parties to the litigation. The Government then attempted to subpoena a copy of the deposition from counsel for plaintiff in the *Dean* case, but the court, early in the trial, refused to permit the Government to do so, on the ground that the deposition had been sealed (R. 158–163).[9]

The next day Eggleston appeared as a Government witness in the instant case. His testimony was in several respects directly contrary to that given on deposition. After the Government had pointed out that fact, and also that Eggleston was

[9] When Judge Igoe refused to unseal the deposition in the *Dean* case, he stated that, if Judge Campbell desired to have it unsealed, all he "has to do is send an appropriate order down here, and we will recognize it" (R. 161). In the instant case, the court, although asked to do so by the Government, refused to request the deposition's unsealing (R. 161, 163).

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en receiving $6,000 a year from Bowman, e court allowed the Government to cross-amine him as a hostile witness (R. 177–178). The urt, however, refused to permit the Government use the deposition in such cross-examination, even ough Government counsel informed the court at, subsequent to the previous day's ruling, the eposition had been unsealed at the instance of ounsel for plaintiff in the *Dean* suit.[10] The fol-owing colloquy ensued (R. 186):

> Mr. JINKINSON [Government Counsel]. Your Honor, there has been a change in the depositions since then [yesterday].
>
> The COURT. I heard all argument on both sides yesterday, and ruled on the Eggleston deposition. The ruling will stand. Proceed with your evidence.
>
> Mr. JINKINSON. Your honor——
>
> The COURT. I will hear no further argument on that point from either side.
>
> Mr. JINKINSON. Your Honor, the Dean depositions have been opened. They were

[10] Bowman and Borden subsequently moved to reseal certain depositions on file in the *Dean* case, including the Eggleston deposition. On April 16, 1953, Judge Igoe entered an order denying resealing of the Eggleston deposition. In this order the court found (1) that the action of plaintiff's counsel in unsealing the depositions was "justified" and (2) that, in view of the charge that Eggleston's testimony in another cause was in conflict with his deposition filed in the private action, "it would not be in the interest of justice to reseal the Eggleston deposition until an investigation has been made of the facts and circumstances concerning such alleged conflict by the Department of Justice of the United States" (R. 137–138).

sealed yesterday, and they have now been opened.

The COURT. I will hear no further argument on the proposition. I have ruled on it. Will you proceed with your case. [See also R. 188–189.]

Eggleston's deposition—pertinent portions of which are set forth in the offer of proof which the Government then filed (R. 52)—contradicted his trial testimony in a number of significant aspects. The principal conflicts are as follows:

(1) At the trial, Eggleston testified that there was "very little" "stop buying" (offering of cash and other gratuities to induce stores to change suppliers) "done [by Bowman] prior to the time I left [June 1943]" (R. 266). In his deposition, however, Eggleston testified that at the time he left Bowman "stop buying" payments were "running maybe 100,000, 150,000 a year" (R. 55).

(2) At the trial Eggleston, when asked whether Ridgeview, Bowman's wholly owned "fighting" subsidiary (R. 193–194), had been operated at a loss, replied: "That I wouldn't know. I had nothing to do with the financial statements" (R. 200). But in his 1951 deposition Eggleston testified that, during the entire time he was with Bowman, Ridgeview was not operated at a profit and Bowman "absorbed the loss" (R. 57).

(3) During the trial, Eggleston denied that he had any agreement with Borden as to the alternate sharing of the milk business of Great Lakes

(R. 175–176). However, in his deposition Eggleston testified that "* * * we had a general understanding with the Borden Company that they would take Great Lakes * * * one quarter and we would take it the other quarter" (R. 61).[11]

(4) During the trial, Eggleston denied having any knowledge of an "arrangement" between Bowman and Borden concerning the division of the public school milk business "whereby they would bid on certain designated schools" (R. 269). But in his deposition Eggleston stated that Borden and Bowman would meet in the fall and agree on a division of the school milk business so that "[w]e wouldn't bid on Borden's schools or they wouldn't bid on ours" (R. 62–63).

(5) Eggleston testified at the trial that, during a price war between Ridgeview (Bowman's fighting subsidiary) and Hawthorn (a competitor), Ridgeview met Hawthorn's prices where "necessary to hold our business" but that "at no time did we go below their prices" (R. 217). But in his deposition Eggleston had testified (R. 59):

> We had men follow behind their [Hawthorn's] trucks and get the names and addresses of their stores and we turned them over to Ridgeview and they sent solicitors in there; and we sold milk as low as five cents a quart off the Ridgeview trucks and——

[11] See Heinz's testimony (*supra*, p. 14) that Eggleston informed him that Borden and Bowman were sharing the Fort Sheridan and Great Lakes milk business.

Q. Then what happened?

A. And Hawthorn was forced to meet that price on a number of accounts.

(6) Although Eggleston flatly stated at the trial that Bowman had "lost stops to the Belmont Dairy [Borden's "fighting" subsidiary]" (R. 200), he had previously stated in his deposition that Bowman and Belmont had a "general understanding" not to use their fighting companies against each other, and that "once in a while, why, Belmont might bother one of our accounts" and he would then call Borden "and tell them about it and it would be adjusted" (R. 58).

In holding that the Government had failed to prove its case, Judge Campbell found that "[p]ortions of Heinz's testimony, if true, would tend to prove the existence of the conspiracy" (Fdg. 18, R. 118). The judge held, however, that since he considered Eggleston, "over all, a truthful witness," and since Heinz's testimony conflicted with Eggleston's "in certain respects" (which the court did not specify), and since Heinz's testimony was not corroborated, Heinz's testimony had to be "discount[ed]" (R. 95).

(2) THE NEWEY TAPE RECORDINGS

Thomas C. McConnell, counsel for the plaintiff in the *Dean* case, had, in preparing that case for trial, secured the use of a grocery store in which milk was sold, wired it for sound, and placed a professional investigator (Paul Newey),

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who also was a lawyer, behind the counter in the role of store owner. Newey contacted five of the defendants, including Borden,[12] told them that he was taking milk from Dean but wished to change his supplier, and requested that they send a representative to discuss serving him. Representatives of each of them called on Newey in April 1950, and his conversations with them—in which they revealed that the defendants had an agreement not to take each other's customers (see *infra*, pp. 23–25)—were electrically recorded (R. 95–96, 373, 382, 387, 388, 390, 395, 396).

A subpoena *duces tecum*, issued to McConnell at the Government's request, called for the production of the Newey tape recordings (R. 96, 158). When McConnell, who was not counsel for any of the parties to the Government suit, made return on the subpoena in open court, he claimed that the recordings were privileged against production because they were his "work product," and the court sustained the claim (R. 96, 165–167, 169).

The Government then subpoenaed Newey to testify as to the conversations he had with the representatives of the five dairies (R. 96, 368). Prior to calling Newey to testify, however, the Government advised the court that it had subpoenaed him, that McConnell had turned over the tape recordings (and transcripts thereof) to Newey,

[12] The other four were Hawthorn, Capitol, Western, and Hunding.

and that Newey had the tapes in his possession and was refreshing his recollection by examining them. Government counsel then said (R. 368):

> It is a question of whether or not this court is going to hear those tapes, and if the Court is going to hear them the Government, of course, would like to have permission from the court to set up in the court room the necessary equipment so that the tapes can be played.

The court thereupon asked if McConnell was waiving his privilege, and Government counsel handed to the court a letter from McConnell to Newey authorizing the latter to submit the tapes to the defendants and to the Government for their use in this case "if the Court sees fit to require you to do so" (R. 148–149, 369). The court, after reading the letter, again ruled against admitting the tapes in evidence, saying that "the ruling made at the time Mr. McConnell asked for it still stands," and that "[t]here is no use of producing the tape recordings here" (R. 369). The court held, however, that Newey might use the tapes to refresh his recollection in connection with his testimony (*ibid.*).

Newey subsequently testified at considerable length, and in so doing used a transcript of the tape recordings and notes he had made thereon to refresh his recollection (R. 96). The court ultimately held, however, that Newey's testimony was "valueless," because it was not based upon

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independent recollection, but upon a reading of the transcript and notes made therefrom, and the court, therefore, concluded that it would "completely disregard" that testimony in reaching its conclusion that the Government had failed to prove conspiracy (R. 96).

Newey's testimony, which the court thus disregarded, set forth the substance of his conversation with each of the representatives who called on him, and was based upon the verbatim recordings of those conversations which the court refused to hear. In brief, the testimony revealed that the defendants' agreement not to take each other's customers, and to give cash and other gratuities to customers of non-defendant dairies for switching their patronage, was still operative in April 1950.

The Borden representative told Newey that it was fortunate that he took milk from Dean, because otherwise Borden could not do business with him, but that since Dean "did not cooperate with any of the other dairies," all the "other dairies were out to get all their [Dean's] stops" (R. 382).[13] Almost identical statements were made by Hawthorn's representative (R. 374–375, 377–378) [14]

[13] The Borden solicitor further stated that, except for Dean business, the only stores which Borden could solicit were those which had closed and whose new owner told the former supplier that "he doesn't want them any more" (R. 386).

[14] The Hawthorn representative told Newey that "it was fortunate for me that I had Dean's milk in the store there, because he wouldn't be able to do business with me otherwise"

who also stated that Hawthorn could take another dairy's stop "only where another dairy would take a stop away from them, and then to get even they could take one of the dairy's stops * * *" (R. 377). Capitol's representative told Newey that the dairies had an "ethical understanding" not to take each other's stops, and that all the dairies "cooperated in using this understanding excepting Dean. Dean was unethical" (R. 389). Western's solicitor stated that Western could solicit Dean's business because Dean was "open business" (R. 391). The Hunding representative told Newey that if Bowman or Borden had been supplying his milk, Hunding could not do business with him, since Hunding did not want to get into trouble "with the other dairies with whom they were cooperating" (R. 396). However, he stated that Dean's business was considered an "open stop" because "Dean's doesn't play ball" (R. 397).

Each of the five dairies also offered Newey financial or other inducements to shift his business from Dean to it. Hawthorn offered him, and later gave him, $200 for signing a one-year contract (R. 375, 381).[15] Capitol offered $250 if Newey

(R. 374), and that "he couldn't take Dean's stops, because Dean didn't cooperate with the other dairies" (*ibid*). The Hawthorn representative stated that he would not serve stores being served by defendants Weiland, Bowman, Western, Borden, and Beloit (R. 375).

[15] The Hawthorn representative refused to give Newey a copy of the signed contract because it was "illegal" (R. 381).

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would sign a one-year contract (R. 388). Western offered to supply milk for two weeks without charge if Newey switched to it (R. 392). Hunding offered $150 (R. 397), and Borden, although unable to give any cash because it was "under indictment" (R. 383), offered to advance Newey the funds to purchase a refrigerator, providing that Newey would sign a statement for the company that he was going to use the money "solely for the purpose of replenishing stock and not * * * to buy any tangible property" (R. 386).

(3) CONVERSATION BETWEEN MOSER AND A DECEASED BORDEN OFFICIAL

The court refused to permit Moser, an executive of an independent dairy, to relate a conversation he had with Baril, a deceased sales manager of defendant Borden, on the ground that such testimony was barred by the Illinois "dead man's" statute which bars testimony by a party to an action concerning conversations with a deceased agent of the adverse party (R. 351).[16] This testimony—as shown by the Government's offer of proof (R. 65)—was that, after Moser had bid successfully to sell milk to the Navy Pier in 1943, Baril told him that the Pier was "Borden's busi-

[16] Earlier in the trial, when the question arose as to testimony relating to a conversation with another deceased official of one of the defendants, the court stated that under the Illinois statute "where the lips of one party to a two-party conversation is sealed in death, the living party may not testify to what it was" (R. 156).

ness," and asked him why he had bid on it (*ibid.*). Moser explained that he needed Government business in order to obtain a priority for machiney (*ibid.*). When Baril told Moser that Borden would have to offset the loss of the Pier business by taking some of Moser's store accounts, Moser stated that he would not bid again for the Pier. He never bid on it again, and did not lose any store accounts to Borden (*ibid.*).

SPECIFICATION OF ERRORS TO BE URGED

The district court erred:

1. In holding that the deposition given by Eggleston in the *Dean* case could not be used to refresh his recollection or to impeach his testimony in this case.

2. In holding that tape recordings of conversations between the witness Newey and agents of certain of the defendants were privileged as an attorney's work product, and therefore could not be subpoenaed from the attorney for whom they had been made.

3. In failing to hold that the attorney had waived his claim of privilege, and in excluding the recordings after such waiver.

4. In holding that testimony by Government witness Moser as to a conversation he had with a deceased agent of defendant Borden was barred under the Illinois "dead man's" statute.

5. In holding that the Government was not entitled to a decree enjoining defendants Borden

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d Bowman and their subsidiaries from violating
ction 2 (a) of the Clayton Act, because such vio-
ions were enjoined by a decree previously en-
ed against them in a private action.
6. In dismissing the complaint.

SUMMARY OF ARGUMENT

I

A. The only reason given by the district court
r refusing to allow the Government to use Eg-
eston's deposition to impeach him was that the
position had been sealed. Once the deposition
as unsealed, however, the reason for its ex-
usion no longer existed, and the Government
en had the right to use it to show that the
itness "had made contradictory statements, oral
written, on the subject" (*Toplitz* v. *Hedden,*
6 U. S. 252, 254). Indeed, Rule 26 (d) (1) of
e Federal Rules of Civil Procedure specifically
uthorizes the use of depositions to impeach a de-
nent's trial testimony.

In his deposition, Eggleston made a number of
atements which flatly contradicted his trial
stimony on matters of importance to the Gov-
rnment's case. If the Government had been
ermitted to show these contradictions, Eggles-
n's credibility as a witness would have been
verely shaken, and the district court would have
ad good reason for giving his trial testimony
ttle credence. This, in turn, would have raised

the probative value of the deposition testimony of Heinz, a key Government witness. For the district judge, although recognizing that "[p]ortions of Heinz's testimony, if true, would tend to prove the existence of the conspiracy," nevertheless "discount[ed]" that testimony because he believed that Eggleston, whom he had observed on the stand, was "over all, a truthful witness," and because Eggleston's testimony "[i]n certain respects" negatived that of Heinz. Thus, by denying the Government the right to impeach Eggleston through his own contradictory deposition statements, the trial court deprived the Government of vital evidence "tend[ing] to prove the existence of the conspiracy."

B. (1) The tape recordings of conversations between the witness Newey and agents of the conspirators were not within the attorney's "work product" privilege. As *Hickman* v. *Taylor,* 329 U. S. 495, makes clear, there is no general privilege against disclosure of material which a lawyer has assembled in connection with pending or recent litigation. The case merely held that, under the pre-trial discovery provisions of the Federal Rules of Civil Procedure, a party to pending litigation could not obtain from counsel for his adversary, on mere demand and as of right, statements of witnesses which counsel had obtained in the course of preparing for possible litigation.

The rationale of the *Hickman* case—that an attorney, while preparing his case, should be

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ree from interference by "opposing parties and heir counsel"—has no applicability where, as ere, the material is sought not by a litigation dversary, but by a party to another case in hich the lawyer is not participating. Moreover, ven under *Hickman,* material in a lawyer's pos- ession which is *admissible as evidence* is not priv- eged. Finally, unlike the situation in *Hickman,* ere the other case had been concluded, and pro- uction of the tape recordings or disclosure of heir contents could not have interfered with the ttorney's conduct of that litigation.

(2) Assuming *arguendo* that the tape record- ngs were privileged initially when the Govern- nent sought to subpoena them, the attorney vaived any privilege when he turned them over to Newey and authorized the latter, if the court di- ected him to do so, to submit them to the defend- nts and to the Government "for their use in the ase." A privilege is personal to the individual laiming it, and may be waived by him.

(3) Newey's testimony, which was based on the ecordings, set forth admissions by agents of the onspirators showing the operation of the con- spiracy in 1950. The district court held, however, hat since Newey had no independent recollection of the transcribed conversations, his testimony was "valueless," and the court "completely dis- regard[ed]" it. Had the district court admitted he recordings, Newey's lack of recollection would have posed no problem, and the court

then could have given these damaging admissions their full probative weight. Thus, the practical effect of the exclusion of the recordings was to deny the Government completely the benefit of this important evidence.

C. The court excluded evidence of a conversation between an executive of an independent dairy and a deceased sales manager of defendant Borden, as banned by the Illinois "dead man's" statute. But that Act, by its express terms and as interpreted by the Illinois courts, bars only testimony *by a party* to an action as to conversations with a deceased agent of the defendant, and does not generally bar testimony by the survivor of a conversation. Since the independent dairy executive was not a party to the instant case, he was not disqualified from testifying as to the conversation.

His testimony related to a successful attempt by Borden to coerce him into refraining from future bidding on Borden's business. Its exclusion further deprived the Government of pertinent evidence probative of the conspiracy.

II

The district court held that, although the Government had shown discriminations in price by defendants Borden and Bowman and their subsidiaries which were in violation of section 2 (a) of the Clayton Act, the Government was not entitled to injunctive relief against such viola-

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tions because they previously had been comprehensively enjoined by a decree in a private antitrust suit. The existence of such a private decree, however, does not terminate the duty of the Attorney General, under section 15 of the Act, to enforce the Act or the need for such enforcement, or the district court's duty to entertain such proceedings.

Even though the decree in the private suit initially may afford the public the same measure of protection as a decree in a Government suit, entry of a decree frequently is not the end of antitrust litigation, and subsequent action or inaction by the private parties may substantially weaken the decree's effectiveness so far as the public is concerned. If the private decree is violated, the United States, not being a party to the suit, cannot bring contempt proceedings to enforce compliance, and the private party may have good reason for not instituting such proceedings. Furthermore, the private parties, even though they fully comply with the decree, may seek modifications which, if granted, will substantially weaken its original protective effect. In short, the protection of the public, which it is the object of the antitrust laws to insure, cannot be achieved if the Government is denied the right to relief because of the existence of a private decree.

United States v. *W. T. Grant Co.*, 345 U. S. 629, does not support the district court's ruling.

That case merely held that the Government there had not shown any need for injunctive relief, since the illegal conduct has been discontinued and there was no "cognizable danger of recurrent violation." In the instant case, however, the Government has shown a real need for relief.

ARGUMENT

I

THE CHALLENGED EVIDENTIARY RULINGS OF THE DISTRICT COURT WERE CLEARLY ERRONEOUS, AND THEIR EFFECT WAS TO DENY THE GOVERNMENT A FAIR OPPORTUNITY TO PRESENT ITS CASE

In Point I, we discuss separately each of the challenged evidentiary rulings, show that error was committed, and demonstrate the resulting prejudicial effect. The prejudicial impact of these rulings is increased when they are considered collectively. The district court's finding that the Government had failed to prove conspiracy was made after the Government had been precluded from effectively cross-examining a key hostile witness upon whose testimony the court greatly relied, and the court had excluded admissible and relevant evidence. In short, the court based its decision upon a record from which vital elements of the Government's case had been improperly excluded.

We do not challenge the court's conclusion that, on the record before it, the Government had not shown conspiracy. But we do contend that, if the court had permitted the Government to

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utilize and introduce the foregoing excluded evidence, it could not reasonably have granted the motion to dismiss the complaint.

A. THE DISTRICT COURT ERRONEOUSLY REFUSED TO PERMIT THE GOVERNMENT TO USE EGGLESTON'S DEPOSITION TO IMPEACH HIS TRIAL TESTIMONY

The truthfulness of Eggleston, a hostile Government witness, was of pivotal significance in this case. It was because the district court accepted Eggleston's testimony that it "discount[ed]" the testimony of Heinz, a key Government witness—testimony which, as the district court recognized, "if true, would tend to prove the existence of the conspiracy" (Fdg. 18, R. 118). Thus, the practical effect of the district court's refusal to allow the Government to impeach Eggleston by showing that he had made contradictory statements in a deposition given in another case was to deprive the Government of the benefit of vital evidence "tend[ing] to prove the existence of the conspiracy."

We do not here challenge the district court's initial ruling that, because the deposition had been sealed, the Government was not entitled to subpoena a copy thereof.[17] But the court clearly

[17] Judge Igoe indicated that the reason for keeping the deposition sealed was that, since the *Dean* case had been settled, there was no reason for disclosing its contents (R. 160–161). But, this hardly seems a sufficient reason to justify refusal to permit the Government access to the facts in its antitrust proceeding.

committed prejudicial error when, after the deposition had been unsealed and that fact had been called to his attention, he nevertheless continued to hold the deposition inadmissible. For once the deposition was no longer under seal, the Government was entitled to use it to impeach Eggleston. Indeed, when the district court ruled that the Government could not subpoena a copy of the then-sealed deposition, he recognized that if the deposition were not sealed, it could be used to impeach the witness (R. 162).

Although Eggleston had been called by the Government, the court permitted him to be cross-examined as a hostile witness (see *supra,* pp. 16–17). In conducting such cross-examination, the Government had the right to show that Eggleston "had made contradictory statements, oral or written, on the subject" (*Toplitz* v. *Hedden,* 146 U. S. 252, 254), and to use Eggleston's deposition for that purpose. Indeed, Rule 26 (d) (1) of the Federal Rules of Civil Procedure specifically authorizes the use of depositions to impeach a deponent's trial testimony. It provides that "[a]ny deposition may be used by any party for the purpose of contradicting or impeaching the testimony of deponent as a witness." Plainly, once Eggleston's deposition had been unsealed, the Government was entitled to use it to show that the trial testimony of this hostile witness was untrustworthy because contradicted by his prior statements. A deposition taken in one case is admissible *as evidence* in another case against parties

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who had notice of its taking *Franzen* v. *E. I. Du Pont De Nemours & Co.*, 146 F. 2d 837, 841–842 (C. A. 3); *Insul-Wool Insulation Corp.* v. *Home Insulation*, 176 F. 2d 502, 504 (C. A. 10); *Rivera* v. *American Export Lines*, 13 F. R. D. 27, 28–30 (S. D. N. Y.). Clearly, therefore, it can be used in the second case for the more limited purpose of impeaching the deponent's testimony there.[18]

In his deposition Eggleston made a number of statements which on their face flatly contradicted his trial testimony on important matters involving the heart of the Government's case (see Statement, *supra*, pp. 18–20). These contradictions related to (1) understandings between Bowman and Borden to divide the business of selling milk to certain military installations and public schools; (2) price wars and the use of fighting companies; and (3) the giving of cash gratuities to induce wholesale customers to shift their patronage from independent dairies to the defendants (*ibid.*)

If the Government had been permitted to confront him with these contradictions, Eggleston might have been induced to admit the truth of the facts in his deposition and, if not, his credibility as a witness would have been severely shaken. In

[18] The fact that Beloit was not a party to the *Dean* case and did not participate in the deposition proceedings does not justify the trial court's ruling. The issue before the trial court was not whether to admit the deposition as evidence, in which event such objection might be pertinent, but whether to permit the Government to use it to show that Eggleston previously had contradicated his trial testimony.

any event, the district court would have had good reason for giving his trial testimony little credence. See *National Labor Relations Board* v. *Pittsburgh S. S. Co.*, 337 U. S. 656, 659. This, in turn, would have raised the probative value of the testimony of the Government's witness, Heinz, and thus strengthened the Government's *prima facie* case.

As we have shown (*supra*, pp. 12–14), Heinz testified (on deposition) that Borden and Bowman had an understanding not to compete for each other's wholesale customers, and to share certain institutional business. The district court recognized that "[p]ortions of Heinz's testimony, if true, would tend to prove the existence of the conspiracy alleged in the complaint" (Fdg. 18, R. 118). The judge, however, "discount[ed]" that testimony because (1) he believed that Eggleston, whom he had observed on the stand, was "over all, a truthful witness," (2) he had been unable to judge Heinz's credibility, and (3) Eggleston's testimony "[i]n certain [unspecified] respects" negated Heinz's alleged uncorroborated testimony (R. 95). In other words, the court chose to believe Eggleston rather than Heinz because of its appraisal of Eggleston's credibility.

Eggleston's veracity thus was a critical issue in the case. Eggleston was an important official of one of the two principal defendants, and the court's acceptance of his testimony unquestionably was a major factor in reaching the decision that

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the Government had not proved its case. But if the Government had been allowed to impeach this hostile witness out of his own mouth, the court would have had no occasion to discount Heinz's testimony which, admittedly, "tend[ed] to prove the existence of the conspiracy."

The fact that Eggleston's trial testimony on certain aspects of the case was, pursuant to court order, restricted to events occurring since 1940,[19] while his deposition testimony generally may not have been so limited, afforded no basis for excluding the deposition. Much of the deposition testimony related to events after 1940, such as testimony as to the substantial volume of "stop buying" when Eggleston left Bowman in 1943 (*supra,* p. 18), or to matters as to which the 1940 cut-off date was not applicable, such as the formation and use of Bowman's and Borden's fighting subsidiaries (R. 51). The other contradictory portions of the deposition did not identify the particular years involved, and on their face related to both pre- and post-1940 events. Indeed, Heinz's testimony that Eggleston informed him, at a series of meetings during the first six months of 1942, of an agreement

[19] Prior to trial, the district court held that, except as to evidence dealing with the formation and operation of Ridgeview and Belmont, the Government would not be allowed to introduce evidence of events prior to September 16, 1940—the date of entry of a consent judgment which terminated a prior Government antitrust suit against certain of the defendants (R. 48).

between Bowman and Borden to share the milk business of two military installations (R. 361), indicates that Eggleston was referring to post-1940 events when he testified on deposition that Bowman and Borden had such an agreement (R. 61). In any event, this possible reconciliation between Eggleston's deposition and his trial testimony is a matter for explanation by him when confronted with the contradictory prior testimony; it cannot now be used to justify exclusion of the deposition.[20]

The express—and only—reason given by the trial court for denying the Government the use of the Eggleston deposition was that it was under seal. Once the deposition had been unsealed, however, the reason for its exclusion no longer existed, and the Government had the right to use it to impeach a hostile witness by showing his prior contradictory statements. The trial court's refusal to permit use of the deposition under these circumstances, with the consequential acceptance of the testimony of Eggleston and rejection of that of Heinz, was clearly erroneous and prejudicial.

[20] Appellees may argue that Eggleston's deposition merely duplicates material in an affidavit given by him in the *Dean* case, which the Government used at the trial in cross-examining him. The affidavit is not a part of the record of trial. It merely summarizes the more detailed information in the deposition, and does not contain the specific facts in the deposition which contradict Eggleston's trial testimony.

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B. THE TAPE RECORDINGS OF CONVERSATIONS BETWEEN NEWEY AND DEFENDANTS' AGENTS WERE NOT COVERED BY THE LAWYER'S WORK PRODUCT PRIVILEGE, AND THE COURT ERRONEOUSLY EXCLUDED THEM

Twice during the trial, the district court refused to permit the Government to utilize tape recordings of conversations between Newey and agents of the defendants, on the ground that such recordings were privileged as "work product" because they had been prepared by McConnell, counsel for plaintiff in the *Dean* case, for his use in that litigation. The first ruling was made when the Government attempted to subpoena the recordings from McConnell himself, and McConnell claimed privilege. The second ruling was made by the court *sua sponte* when, after McConnell had released the tapes to Newey and specifically authorized him, if the court should so direct, to turn them over to the Government for use in this case, the court nevertheless refused to permit the Government to set up equipment for playing the recordings in the courtroom.

These rulings apparently were grounded on the court's theory that all material which a lawyer has assembled in connection with pending or recent litigation enjoys a general privilege against disclosure.[21] We submit, however, that such a broad concept of the lawyer's "work product"

[21] The court, in initially sustaining McConnell's claim of privilege, stated that he did not "see any reason for requiring him to turn over that or any other portion of his work papers or his preparation for trial in another case" (R. 169).

privilege was specifically rejected by this Court in *Hickman* v. *Taylor,* 329 U. S. 495. The work product privilege has no applicability to material which is sought for introduction in evidence in another case in which the lawyer affected is not participating. The tape recordings were admissible evidence—mechanical reproductions of admissions made by co-conspirators in the course of a conspiracy [22]—and their exclusion by the court was prejudicial error.

[22] In brief, the tapes set forth conversations between Newey and agents of five of the defendants (Borden, Capitol, Western, Hunding, and Hawthorn), in which each agent told Newey that the dairies had an agreement not to take each other's wholesale customers, and offered him gratuities to shift his business from the Dean Milk Company (see Statement, *supra*, pp. 23–25). These statements were made by the employees in the course of their employment (see *supra*, p. 21). The admissions of the Borden representative obviously were admissible against appellee Borden. Further, the statements of all of the agents were admissible against their respective employers' co-conspirators, the present appellees, as admissions of conspirators made in the course and furtherance of the conspiracy. *Bannon and Mulkey* v. *United States*, 156 U. S. 464, 469; *Hitchman Coal & Coke Co.* v. *Mitchell*, 245 U. S. 229, 249–250; *American Tobacco Co.* v. *United States*, 147 F. 2d 93, 118 (C. A. 6), affirmed, 328 U. S. 781. Plainly, there was sufficient independent evidence of conspiracy, apart from the Newey conversations, to make these admissions competent against the other defendants (see Statement, *supra*, pp. 9–15). Cf. *United States* v. *U. S. Gypsum Co.*, 333 U. S. 364, 388–389; *United States* v. *Arrow Packing Corp.*, 153 F. 2d 669, 670–671 (C. A. 2); *United States* v. *Manton*, 107 F. 2d 834, 843–844 (C. A. 2).

Contemporaneous mechanical reproductions of events—recordings, motion pictures, and photographs—are generally

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1. The tape recordings were not within the work product privilege. (a) In *Hickman* v. *Taylor, supra,* this Court held that, under the pre-trial discovery provisions of the Federal Rules of Civil Procedure, a party to pending litigation cannot obtain from counsel for an adverse party, on mere demand and as a matter of right, oral and written statements of witnesses which counsel had obtained in the course of preparation for possible litigation. The Court stated that since it was necessary that an attorney preparing a case be able to work "with a certain degree of privacy, free from unnecessary intrusion by opposing parties and their counsel" (pp. 510, 511), the broad sweep of the Federal discovery rules could not be interpreted to compel the production of written statements or mental impressions contained in an attorney's files and mind "without any showing of necessity or any indication or claim that denial

admissible to prove the events. *United States* v. *Schaneman*, 150 F. 2d 941, 944 (C. A. 3) (recordings); *United States* v. *Moran*, 194 F. 2d 623, 626 (C. A. 2), certiorari denied, 343 U. S. 965 (motion pictures); see 3 Wigmore on *Evidence* (3d Ed.), §§ 792, 798*a* (b); *id.*, 1953 Supp., § 792*a*. The state cases are to be the same effect. E. g., *Commonwealth* v. *Clark*, 123 Pa. Super. 277, 285, 187 A. 237, 240 ("speak-o-phone" records); *McGoorty* v. *Benhart*, 305 Ill. App. 458, 468–472, 27 N. E. 2d 289, 294 (motion pictures); *Frank* v. *Cossitt Cement Products, Inc.*, 197 Misc. 670, 672, 97 N. Y. Supp. 2d 337 (wire recordings); *People* v. *Hayes*, 21 Cal. App. 2d 320, 71 P. 2d 321 (sound motion picture); *State* v. *Spencer*, 258 P. 2d 1147, 1152–1153 (Idaho) (wire recordings); *Kilpatrick* v. *Kilpatrick*, 123 Conn. 218, 223–226, 193 A. 765, 767–769 ("speak-o-phone" records and transcripts thereof).

of such production would unduly prejudice the preparation of petitioner's case or cause him any hardship or injustice" (p. 509).[23]

The Court expressly stated, however, that it was not holding that *all* written materials obtained or prepared by an adversary's counsel with an eye toward litigation "are necessarily free from discovery in all cases," since "[w]here relevant and non-privileged facts remain hidden in an attorney's file and where production of those facts is essential to the preparation of one's case, discovery may properly be had" (p. 511). It pointed out that such written statements and documents "might, under certain circumstances, *be admissible in evidence* * * *" (*ibid.*, emphasis added). Thus this Court specifically rejected the theory of the Court of Appeals in *Hickman,* that all work materials in a lawyer's possession are privileged.[24]

(b) The *Hickman* case applied the work product privilege to deny discovery sought against counsel for an adverse party in pending litigation. The considerations which justify the existence of the privilege in that situation, however, have no applicability where, as here, the material is sought not by a litigation adversary, but by a

[23] The Court pointed out that if materials reflecting a lawyer's mental processes were open to opposing counsel on "mere demand," an attorney's "heretofore inviolate" thoughts would not be his own, and that the effect upon the legal profession would be "demoralizing" and the interests of clients and of justice would be "poorly served" (p. 511).

[24] *Hickman* v. *Taylor*, 153 F. 2d 212 (C. A. 3).

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party to another case in which the lawyer is not participating.

Production of the material to such a non-adversary creates no danger that the lawyer involved may be subject to "undue and needless interference" from *"opposing parties and their counsel"*—the consideration upon which discovery was denied in the *Hickman* case. No sound public policy would be served by extending the privilege to cover use of the material by third persons in a different case. On the contrary, such an unwarranted broadening of the privilege would hinder, rather than help, the ascertainment of the truth,[25] and thus would contravene the "fundamental basis upon which all rules of evidence must rest—* * * their adaptation to the successful development of the truth." *Funk* v. *United States,* 290 U. S. 371, 381.

Apart from the traditional lawyer-client privilege—which McConnell specifically disclaimed at the trial (R. 165) and which plainly is not applicable here[26]—a lawyer's status gives him no claim to special treatment when he is called upon to produce evidence in his possession. Cf. *Modern Woodmen of America* v. *Watkins,* 132 F. 2d 352, 354 (C. A. 5); *Steiner* v. *United States,* 134 F. 2d 931, 935 (C. A. 5), certiorari denied, 319 U. S.

[25] Note, 62 Harv. L. Rev. 269, 273–274, 276.

[26] *United States* v. *United Shoe Machinery Corp.*, 89 F. Supp. 357, 361 (D. Mass.).

774. The work product privilege should be restricted to its basic purpose: protection of lawyers in their capacity as adverse trial counsel. *Hickman* case, *supra; Scourtes* v. *Fred W. Albrecht Grocery Co.*, 15 F. R. D. 55, 58 (N. D. Ohio); Note, 62 Harv. L. Rev. 269, 273–274, 276.

(c) But even if, under *Hickman* v. *Taylor*, the work product privilege may be relied on to protect material in the possession of a non-adversary attorney from disclosure, the privilege still would not cover the recordings in this case. Written statements or other documentary evidence in an attorney's files—as distinct from the lawyer's own work papers—which are admissible as evidence are not privileged, *Hickman* case, p. 511, Mr. Justice Jackson, concurring, *Id.*, p. 515,[27] and the same principle should govern admissible recordings. Here, the recordings incorporate little, if any, of the attorneys "mental impressions" (p. 510), and their production would not expose his "mental processes" to the "free scrutiny" of a litigation adversary (p. 514). Furthermore, upon a showing of good cause, discovery may be had of verbatim reproductions and transcriptions of statements of potential witnesses. *Hickman* case, pp. 512–513; *Molloy* v. *Trawler Flying Cloud*, 10 F. R. D. 158 (D. Mass.); *Scourtes* case, *supra*,

[27] "It seems clear and long has been recognized that discovery should provide a party access to anything that is evidence in his case."

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p. 59.[28] Finally, unlike the situation in *Hickman,* where the litigation was still in the pre-trial stage, here the *Dean* case had been concluded when the Government sought the recordings.[29] Thus, production of the tapes or disclosure of their contents could not have interfered with McConnell's conduct of the *Dean* litigation.

2. McConnell waived any privilege with respect to the tape recordings by releasing them to Newey and authorizing him to turn them over to the Government. As we have shown (*supra,* pp. 41–45), the district court improperly sustained McConnell's claim of work product privilege when the Government attempted to subpoena the tape recordings. But even assuming *arguendo* that initially the recordings were privileged, McConnell waived any privilege by turning them over to Newey and authorizing the latter to "submit the

[28] Cf. *Shields* v. *Sobelman*, 64 F. Supp. 619 (E. D. Pa.), holding that photographs taken pursuant to an attorney's direction in anticipation of, or preparation for, litigation, are not privileged against discovery. Accord: *Cogdill* v. *Tennessee Valley Authority*, 7 F. R. D. 411 (E. D. Tenn.); *Lauritzen* v. *Atlantic Greyhound Corp.*, 8 F. R. D. 237 (E. D. Tenn.), affirmed, 187 F. 2d 540 (C. A. 6).

[29] Although McConnell contended on the return of the subpoena that he was still "in a lawsuit" with some of the defendants (R. 165), the Judge in the *Dean* case previously had stated that that case "has now been ended by consent decree," and that, since a money judgment and an injunction had been entered, the "case has been concluded" (R. 160). This statement had been read into the record by Judge Campbell prior to his sustention of McConnell's claim of privilege.

tape recordings * * * to the defendants in the case as well as to the Government for their use in the case" (R. 149). And, once McConnell had waived his privilege, the district court had no basis for excluding the recordings from evidence (see *supra,* n. 22).

Since the purpose of the work product privilege is to protect an attorney engaged in preparing a case from the "unnecessary intrusion by opposing parties and their counsel," *Hickman* case, pp. 510–511, there is no reason for applying the privilege to material which the attorney himself has made available to third persons. And it is immaterial whether the attorney directly furnishes such material, or whether, as here, he does so indirectly by authorizing another person to make it available. In either situation, his release of the material terminates its privileged character.

A privilege is personal to the individual asserting it, and may be waived by him. 8 Wigmore on *Evidence* (3rd Ed.), § 2196, pp. 102–103, § 2327; *Steen* v. *First National Bank,* 298 Fed. 36, 41 (C. A. 8, 1924). Indeed, waiver of a privilege is in the "interest of truth and justice," and should, therefore, be favored. *Steen* case, *supra; Cafritz* v. *Koslow,* 167 F. 2d 749, 751 (C. A. D. C.). In the instant case, McConnell turned over the tape recordings and transcripts to Newey, and at the same time he specifically authorized the latter, "if the Court sees fit to require you to do so," to submit the recordings and transcripts to both the

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defendants and "to the Government for their use in the [instant] case." McConnell thus not only parted with the physical possession of the material, but specifically authorized the recipient to turn it over to the Government to "use in the case." In other words, McConnell abandoned his prior claim that the recordings were inviolate against disclosure.[30]

After McConnell had consented to the Government's use of the recordings in this case, Government counsel sought permission from the court "to set up in the court room the necessary equipment so that the tapes can be played" (R. 368). When the court then inquired whether McConnell was "now waiving his privilege," Government counsel handed to the court McConnell's letter to Newey authorizing the latter to allow the Government to use the tapes. The court, however, interpreted the letter as merely authorizing Newey "to refresh his recollection from certain tape recordings" (R. 369), and held that "the ruling made at the time Mr. McConnell asked for it [i. e., that the tapes were privileged] still stands," and

[30] The fact that McConnell's primary purpose in releasing the tapes to Newey may have been to allow Newey to refresh his recollection preparatory to testifying in the instant case, and that Newey's authority to turn over the tapes to the Government was to be exercised "if the Court sees fit to require you to do so," does not negate the waiver of privilege. Indeed, if the recordings were still privileged, the court could not, in accordance with McConnell's letter, properly authorize Newey to make them available to the Government.

that "[t]here is no use of producing the tape recordings here" (*ibid.*).

Thus, contrary to appellees' contention (Appellees' Motion to Dismiss or Affirm, p. 8) and to the statement in the district court's opinion (R. 96), the Government did not elect to call Newey to testify instead of offering the tapes, but was forced to call him as the result of the court's refusal to hear the recordings. Indeed, the Government had no choice but to put Newey on the stand if it wished to offer any evidence relating to the admissions which the defendants' agents had made to him.

3. The district court's exclusion of the tape recordings substantially prejudiced the Government. As we have noted, Newey's testimony—which was based on the recordings—contained admissions by the defendants that the dairies had an agreement not to take each other's customers (see *supra*, note 22). Had the district court given this evidence its normal probative weight, it would have constituted substantial proof of the Government's charge of conspiracy. Indeed, this evidence was particularly significant in that it showed that the conspiracy was still operative as recently as 1950. The district court found, however, that because of Newey's lack of independent recollection of his conversations with the defendants' agents, his testimony was "valueless,"

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and the court "completely disregard[ed]" it.[31] In so holding, the court noted that after each question was asked, Newey read "extensively" from transcripts of the recordings and his notes thereof, and that his answers "were almost all based upon such an extensive reading" (R. 96).

If the district court had admitted the tape recordings, Newey's lack of recollection would have posed no problem. With the actual oral statements before him, Judge Campbell could have given these damaging admissions the full weight to which they were entitled. Thus, the practical effect of the court's exclusion of the recordings was to deny the Government completely the benefit of Newey's important evidence.

C. THE ILLINOIS "DEAD MAN'S" STATUTE DOES NOT BAR MOSER'S TESTIMONY AS TO CONVERSATIONS WITH A DECEASED BORDEN OFFICIAL

When the Government sought to introduce testimony by Moser, an executive of an independent dairy, as to a conversation he had with a deceased sales manager of Borden, the district court excluded such testimony under the Illinois "dead man's" statute. That Act provides that:

[31] The fact that a witness has to refresh his memory extensively while testifying does not of itself make his testimony untrustworthy, but merely raises a question as to the reliability of the material which he uses. *United States* v. *Riccardi*, 174 F. 2d 883, 889–890 (C. A. 3), certiorari denied, 337 U. S. 941. During the time that Newey was testifying, the transcripts of the recordings were present in the courtroom and available for the court's examination. (Appellees' Motion to Dismiss or Affirm, p. 6.)

> * * * in every action, suit or proceeding a *party to the same* who has contracted with an agent of the adverse party—the agent having since died—shall not be a competent witness as to any admission or conversation between *himself* and such agent * * * [Ill. Rev. Stat., 1945, C. 51 § 4; emphasis added].

The court interpreted the statute as applying to "any conversation with a dead man * * *. I mean, the purpose of the rule is that where the lips of one party to a two-party conversation is sealed in death, the living party may not testify to what it was" (R. 156).[32]

This interpretation is untenable. For the statute by its express terms and as interpreted by the Illinois courts, applies only to a party to an action, and not generally to a survivor of a conversation. *Reilly Tar & Chemical Corp.* v. *Lewis*, 326 Ill. App. 117, 121; cf. *Hill* v. *A. J. Canfield Co.*, 157 F. 2d 849, 850 (C. A. 7).[33]

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[32] The court made this statement earlier in the trial, when the question first arose in connection with testimony relating to a conversation with another deceased official of one of the defendants (R. 156). When the issue was subsequently raised, the court refused to permit Government counsel to state his position on the question (R. 310, 360):

"The COURT. The objection is overruled [sustained].

"Mr. JINKINSON. Your Honor, this is the first time, I think, that we have a clear-cut issue in reference to the dead man's statute since it came up the first time. Since that time we briefed the law; I would like to be heard on it.

"The COURT. The ruling will stand. Proceed."

[33] The general purpose of this provision is, of course, to bar testimony not subject to independent corroboration when the

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Since Moser was not a party to the instant case, he was not disqualified under the statute from testifying as to his conversation with the deceased Borden official. Cf. *Delaney* v. *United States*, 263 U. S. 586, 590. His testimony related to a successful attempt by that official to coerce him into refraining from bidding on Borden's business in the future (see *supra*, pp. 25–26). It was plainly admissible and relevant, and its exclusion further deprived the Government of pertinent evidence probative of the conspiracy.

II

THE FACT THAT THE OUTSTANDING DECREE IN THE DEAN CASE ENJOINS THE DEFENDANTS FROM VIOLATING SECTION 2 (a) OF THE CLAYTON ACT DOES NOT BAR THE GOVERNMENT, IN ITS OWN ANTITRUST SUIT, FROM OBTAINING INJUNCTIVE RELIEF AGAINST SUCH VIOLATIONS

Although the district court found that the Government had shown that Borden and Bowman and their subsidiaries had discriminated in price among their wholesale customers (Fdg. 36, R. 121–122)—discriminations which established *prima facie* violations of section 2 (a) of the Clayton Act—the court nevertheless held that the Government could not obtain injunctive relief against

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witness' principal interest is to succeed in his law suit. Under another provision of the Illinois statute (Ill. Rev. Stat., 1945, C. 51, § 2) relating to suits against the estates of deceased persons, conversations with the deceased may be proved through witnesses who are not parties to the action or who have no direct pecuniary interest therein. *Creighton* v. *Elgin*, 387 Ill. 592, 605; *Schell* v. *Weaver*, 225 Ill. 159, 162.

such violations.[34] Its rationale was that the decree in the *Dean* case "effectively enjoined" these companies from performing any of the acts against which the Government had sought injunctive relief (Fdg. 38, R. 123; Conclusion of Law 9, R. 124–125). We submit, however, that the Government has an independent right to relief against violations of the Clayton Act, without regard to whether such violations previously have been enjoined by a decree in a private antitrust suit.

Section 15 of the Clayton Act makes it the "duty" of the several United States district attorneys, under the direction of the Attorney General, to institute civil proceedings to "prevent and restrain" violations of the Act, and vests in the Federal district courts jurisdiction of such proceedings. The existence of an outstanding judgment in a private antitrust suit does not

[34] Section 2 (a) of the Clayton Act makes it unlawful for any person engaged in commerce to discriminate in price between different purchasers of commodities of like grade and quality. Upon proof of such discrimination, the burden of justification is upon the person charged with violation (section 2 (b)). Price discriminations may be justified by showing that they reflect differences in cost of manufacture, sale, or delivery (section 2 (a)), or that they were made in good faith to meet an equally low price of a competitor (section 2 (b)).

The court stated that, since the Government had shown discriminations in price, "ordinarily" the defendants would have the burden of establishing that they came within the statutory exceptions. The court held, however, that there was "one factor" which relieved them from that burden—the decree in the *Dean* case (R. 108–109).

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terminate the Attorney General's duty to enforce the Act or the need for such enforcement, or the district court's duty to entertain such a proceeding. Obviously, a private judgment to which the Government is not a party does not bar a subsequent antitrust suit by the United States. In addition, even though an outstanding antitrust decree in favor of a private plaintiff initially may afford the public the same measure of protection as a decree in a Government suit, entry of a decree frequently is not the end of antitrust litigation, and subsequent action or inaction by the private parties may substantially weaken the decree's effectiveness as far as the public is concerned.

If the private decree is violated, the United States, not being a party to the suit, cannot bring contempt proceedings to enforce compliance, and the private plaintiff may have good reason for not instituting such proceedings. For example, if the violations are directed against his competitors instead of him, it may be to his interest to allow them to continue, even if the public generally may be injured thereby. The private controversy may be settled, compromised, or abandoned by the plaintiff for what to him is sufficient reason. Furthermore, the private parties, even though they fully comply with the decree, may seek modifications which, if granted, will substantially weaken its original protective effect. In-

deed, that very thing has happened in this case. Subsequent to entry of the judgment below, appellee Bowman has sought modification of the decree in the *Dean* case—the very decree upon which Judge Campbell based his refusal to grant injunctive relief to the Government—which could result in seriously weakening its prohibitory provisions.[35]

In short, the protection of the public which it is the object of the antitrust laws to insure cannot be achieved if the Government is denied the right to relief because of the existence of a private decree.[36] It was for this reason, presumably,

[35] Bowman's petition in the *Dean* case—pertinent portions of which are set forth in the Appendix to this brief—alleges that since entry of the consent judgment a number of independent milk distributors and vendors have, in violation of sections 2 (a), (d), and (e) of the Clayton Act, taken customers away from, and retained customers solicited by, Bowman, by discriminating in price in favor of such customers. The petition states that, unless such price discriminations are restrained, the *Dean* decree will be "frustrated and ineffective," since the parties to that decree, in order to preserve their business, "will be compelled to meet such competitive offers and practices which are of the type that the decree of this Court * * * was designed and intended to prohibit." The relief requested by Bowman is either that the court make such distributors and vendors parties defendant in the *Dean* case and subject to the decree, or alternatively that the court "direct" Bowman "as to such further course of action as to the Court may seem meet and appropriate in the premises to grant relief" to it and to the other parties.

[36] Government intervention in the private action would not be an adequate substitute for a decree in a Government suit. Such intervention—allowance of which is discretion-

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t Congress provided in the Clayton Act for arate enforcement actions by the Attorney neral under section 15 and by the private party der section 16.[37] The respective interests to be dicated in such actions are different—the pri-e party merely seeks to rectify his own per-nal "threatened loss or damage" (section 16), ile the Attorney General acts as the "repre-ntative of the public" (*United States* v. *Para-unt Pictures*, 334 U. S. 131, 177)—and the two its "may proceed simultaneously or in disre-rd of each other." *United States* v. *Bendix me Appliances*, 10 F. R. D. 73, 77 (S. D. N. Y.). *United States* v. *W. T. Grant Co.*, 345 U. S. 9, does not support the district court's ruling. hat case merely held that the Government had t shown that the chancellor had abused his dis-etion in denying an injunction in proceedings der section 8 of the Clayton Act where the

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, *General Electric Co.* v. *Hygrade Sylvania Corp.*, 45 F. pp. 714, 715, 719 (S. D. N. Y.), cf. *Sutphen Estates* v. *nited States*, 342 U. S. 19—would still deny the Govern-nt that effective control over the litigation which is essen-l to enforcement of the antitrust laws. Indeed, it is the ed for such control which has led the courts to deny pri-te parties intervention in Government antitrust cases nerally. *United States* v. *Northern Securities Co.*, 128 d. 808, 812 (S. D. Minn.), affirmed, 193 U. S. 197; see *nited States* v. *General Electric Co.*, 95 F. Supp. 165, 168 D. N. J.).

[37] The legislative history of the Clayton Act shows that ongress intended these suits to be "cumulative," not exclu-ve, remedies. S. Rep. 698, 63d Cong., 2d Sess., pp. 42–50; Cong. Rec. 16276, 16319; see *Federal Trade Commission Cement Institute*, 333 U. S. 683, 693–694.

violations had terminated shortly after the complaint had been filed. The Court stated that, in order to justify injunctive relief despite discontinuance of the illegal conduct, the moving party must show "that there exists some cognizable danger of recurrent violation, something more than the mere possibility which serves to keep the case alive." P. 633.

The decision in *Grant* thus was based on the fact that the Government had not shown the need for any injunctive relief. In the instant case, however, as we have noted, there is a real need for a decree in the Government suit, and entry of such decree would not be, as the district court characterized it, "a useless task" (R. 111).

CONCLUSION

For the foregoing reasons, the judgment of the district court dismissing the complaint should be reversed and the case remanded for a new trial.

Respectfully submitted.

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STANLEY N. BARNES,
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APRIL 1954.

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APPENDIX

[Excerpts from "Report and Petition for Relief b Bowman Dairy Company" filed by the latter in *Dean Milk Company* v. *American Processing & Sales Company, Inc., et al.*, No. 49 C. 1159, N. D. Ill., E. D.]

* * * * *

2. On to wit, July 21, 1949, Dean Milk Company, an Illinois corporation, filed against American Processing and Sales Company, The Borden Company, Bowman Dairy Company, Western-United Dairy Company, Capitol Dairy Company, Hunding Dairy Company, and others, a complaint in which plaintiff claimed that said defendants had violated Secs. 1 and 2 of the Sherman Act and Secs. 2 (a), 2 (d), 2 (e) and 2 (f) of the Clayton Act, as amended. On June 20, 1950, Dean Milk Company (hereinafter referred to as "Dean") filed its amended complaint realleging its claim that said defendants had violated said laws.

* * * * *

4. On September 25, 1952, the aforesaid parties entered into a stipulation subject to the approval of this Court that an injunction decree might be entered herein containing certain provisions. In Paragraph 1 (h) of said stipulation it was provided:

> The injunction decree shall contain a provision in and by which the Court re-

> tains jurisdiction of this cause to join other parties defendant hereto on the application of plaintiff or any defendant and to make such additional defendants parties to the aforesaid injunction decree or any other order or injunction decree.

Said stipulation was approved by this Court on September 25, 1952.

5. On December 3, 1952, a decree was entered by the Court upon the consent of the parties named in Paragraph 2 of this petition. The said decree included the following provisions, among others: [Provisions of the decree set forth.]

* * * * *

8. All of the distributors and vendors hereinafter listed have knowledge of the entry of the said decree dated December 3, 1952, and have generally or specifically familiarized themselves particularly with the terms of the said decree. Since the entry of such decree, each of the said distributors and vendors hereinafter listed has individually or by concert of action made gifts and loans of money, gifts of merchandise and gifts of fixtures and equipment and offered loans of money, loans of fixtures and equipment, and arranged and facilitated loans to store customers from others, and charged store customers lower prices for fluid milk than charged by such distributor or vendor to others of its store customers in Cook and Du Page Counties, and paid larger rebates, commissions and discounts in connection with the sale of fluid milk to former store customers of the Bowman Dairy Company than have been offered or paid by such distributors and vendors to others of their store customers, all for

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the purpose of and with the effect of obtaining the business and custom of the store customers of the defendant, Bowman Dairy Company. A list of such store customers whose business and custom has been lost by the defendant Bowman Dairy Company to such vendors and distributors is hereto attached, marked "Exhibit A" and by reference made a part hereof.

9. By means of the acts and practices alleged in Paragraph 8, each of the said distributors and vendors has obtained the fluid milk business of store customers formerly served by your petitioner and have retained the fluid milk business of other customers solicited by the petitioner. In addition, each of the said distributors and vendors has attempted to obtain the fluid milk business of other store customers served by the petitioner by offering to such customers gifts and loans of money and property and by offering to sell them fluid milk at prices lower than the prices then being charged by the said distributor or vendor to others of his or its store customers and by offering them rebates, commissions and discounts in connection with the sale of fluid milk, which exceed the rebates, commissions and discounts paid by the said distributor and vendor to his or its other customers. Wherefore, your petitioner alleges that unless restrained by this Court, the said distributors and vendors hereinafter listed will continue to obtain and attempt to obtain the fluid milk business of store customers of the petitioner by means of the aforesaid illegal acts, practices and offers, all to the damage of this petitioner in amounts which are not readily

susceptible of calculation and which said damage will be irreparable.

10. While engaged in such interstate commerce in fluid milk in the Counties of Cook and Du Page in the Northern District of Illinois and in the course of such commerce, the said distributors and vendors have discriminated in price between different purchasers of fluid milk of like grade and quality by means of the various acts, practices, inducements and offers hereinabove set forth and have thereby substantially injured competition between the customers receiving the benefits of such discrimination and their competitors, and have also injured competition between themselves and the various parties plaintiff and defendant to the aforesaid decree, including the petitioner. By such discriminations, each of the said distributors and vendors have discriminated among his or its store customers in the sale of fluid milk in the Counties of Cook and Du Page in the Northern District of Illinois and has thereby violated Secs. 2 (a), 2 (d) and 2 (e) of the Clayton Act, as amended.

11. Unless the said distributors and vendors are restrained from selling fluid milk to store customers and offering to sell fluid milk to other customers at discriminatory prices, and from engaging in the various discriminatory acts and practices hereinabove alleged, the intent and purpose of the aforesaid decree will be largely frustrated and ineffective for the reason that the parties to the said decree, in order to preserve the business and custom of the store customers individually served by the plaintiff and defendants in the above entitled cause, will be compelled

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to meet such competitive offers and practices which are of the type that the decree of this Court entered on to wit, December 3, 1952, was designed and intended to prohibit, and each of the said defendants and the plaintiff, including your petitioner, will be irreparably injured in its business and property by the loss of the business and custom of various store customers.

* * * * *

Wherefore, your petitioner, Bowman Dairy Company, prays that this Court enter an order making the said distributors and vendors hereinbefore listed in Paragraph 12 parties defendant in the above entitled cause in accordance with the provisions of Paragraph XVII of the decree dated December 3, 1952, and parties defendant to the said decree, or in the alternative, direct your petitioner as to such further course of action as to the Court may seem meet and appropriate in the premises to grant relief to your petitioner and the other parties plaintiff and defendant in the above entitled action.

BOWMAN DAIRY COMPANY,
a Corporation, Petitioner.
By ——— ———,
Its Attorneys.

U. S. GOVERNMENT PRINTING OFFICE: 1954

In the Supreme Court of the United States

OCTOBER TERM, 1953

No. 464

UNITED STATES OF AMERICA, APPELLANT

v.

THE BORDEN COMPANY, ET AL.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF ILLINOIS

REPLY BRIEF FOR THE UNITED STATES

Appellees have significantly failed to meet head-on the principal issues upon which the court below ruled and which are discussed in our main brief.[1] Thus, they treat the issue of whether the Eggleston deposition was properly unsealed, and therefore available for use, rather cursorily as a subsidiary point; they do not even urge that the

[1] In this reply references to appellees' brief are intended to include only the brief filed by Borden, Belmont, Bowman, and Ridgeview. Appellee Beloit has filed a separate brief which will be specifically named when reference is made to it. References to the respective briefs will appear as "Br." and as "Beloit Br."

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tape recordings were privileged as a lawyer's work product; and they rely not at all on the Illinois dead man's statute. They seek to support the court's refusal to enjoin the Clayton Act violations not on the basis of the injunction in the *Dean* case, but on the theory that apart from it the Government did not make out a case for injunctive relief. But although they have avoided the grounds followed by the court below in supporting its rulings, appellees have ranged far and wide to find other bases justifying the result. That is what makes this brief necessary.

1. THE EGGLESTON DEPOSITION

The basic issue on this point is whether the removal of the seal which had been placed on the deposition made it available for appropriate use at the trial. Once that issue has been passed, we can turn to the secondary questions of whether the use to which the Government proposed to put it was proper, and whether the refusal of the court to permit its use hurt the Government's case. Yet appellees hardly touch on the merits of the controversy, treating it merely as subpoint 5 of Point I A. (Br. 30–31.) But on even so brief a presentation appellees were unable to avoid passing reference to the fact that Judge Igoe, under whose order the deposition had been retained under seal, has himself later found that the unsealing of the deposition was "justified". (Br. 32; R. 137.) This unsealing admittedly occurred be-

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re the Government attempted to use the deposi-
on at the trial; the deposition was unsealed on
arch 5, 1953, while the ruling complained of
curred on March 6, 1953. (R. 129, 185–189;
r. 10.) As appellees concede (Br. 10, 31), and
Judge Igoe himself found (R. 137), the unseal-
g was performed by counsel for the plaintiff
the *Dean* case, in connection with which the
eposition had been taken, under Rule 14 of the
ules of the District Court for the Northern Dis-
ict of Illinois.

Appellees' only answer to this obvious proposi-
on is to imply that there was something im-
roper about the means adopted by the Govern-
ent to obtain the deposition from the Clerk of
ne Court (Br. 10–11). This suggestion is with-
ut merit. In order to obtain and use a sealed
eposition, two steps must first be taken: (a)
ne person seeking possession of the deposition
ust obtain an order permitting its withdrawal
rom the court and (b) the deposition must be
nsealed by court order or by direction of any
f the parties. (See Rule 14 quoted in Appel-
ees' Brief, p. 10, note 5.) These steps need not
e taken in this sequence. On January 23, 1953,
he Government obtained an order permitting the
ithdrawal of the Eggleston deposition (R. 133).
Thereafter, on January 28, 1953, it moved before
Judge Igoe, who sat in the *Dean* case, to unseal
he deposition (Appellees' Brief, appendix, p.
9). Judge Igoe issued an order refusing to un-

seal the Eggleston deposition on February 10, 1953 (R. 159–161). However, this order by Judge Igoe did not rescind or supersede the withdrawal order obtained by the Government on January 23, 1953, although, admittedly, that order could not help the Government if the deposition remained sealed. On March 5, 1953, McConnell, counsel for the plaintiff in the *Dean* case, caused the deposition to be unsealed (R. 135). It was at this point that the Government, under authority of the still outstanding withdrawal order of January 23, 1953, obtained the unsealed Eggleston deposition (R. 129, 132, 133).

Thus the question raised by appellees resolves itself into whether the Government properly used the old withdrawal order, or should have sought a new one. This question, after the seal had been removed, is entirely a matter of form. The Government clearly was not guilty of any improper procedure in the matter.

Appellees also argue that the Government invited error by reason of the fact that it postponed a decision by Judge Igoe on the issue of resealing the depositions until after the trial (Br. 32). The difficulty with this proposition is that the ruling objected to came on March 6, while the defendants' motion before Judge Igoe was not made until March 9 (Br. 11). At that time the Government had totally failed in its attempt to persuade the court below to allow it to use the

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deposition, the error had been committed, and the Government had everything to gain and nothing to lose by putting the matter up to Judge Igoe.

Actually, there is little at issue between the parties as to whether the deposition was available for a proper use on March 6, although appellees attempt to disguise this fact under a multitude of arguments as to why it should not have been accepted for the specific use proposed. Appellees argue first that, if the Government wished to impeach Eggleston, there were a number of other sources to prove he was contradicting himself, such as his testimony before the grand jury, a nine-page affidavit he had given to his attorney, or oral statements made to Government attorneys (Br. 21). We do not know on what basis appellees assume that the secret grand jury testimony would have impeached the witness, but, in any event, the resulting indictment was still pending, and, even pretermitting the propriety of using the grand jury testimony, the Government may well have had sound reasons of policy for not doing so. As we pointed out in our main brief (p. 38), the affidavit was a generalized statement which was not sufficient to serve the same purpose as the deposition. And the introduction of evidence of the oral statements to the Government attorneys, assuming that they provided material for impeachment, would only result in pitting one man's word

against another. We submit that the Government was entitled to choose the material which it believed would be most effective for impeachment.

In our main brief we pointed up the importance of the exclusion of the deposition by referring to the court's own comments that it could not accept as accurate the deposition of another Government witness, Heinz, which conflicted with Eggleston's testimony, for the reason that the latter was "over all, a truthful witness" (R. 118). Appellees seek to depreciate this argument by quoting a selected portion of the court's findings which would indicate that Heinz's statement dealt only with "meetings which took place over twelve years ago between two of ten alleged conspirators" (Br. 23). While it is true that Heinz's testimony did deal in part with conversations in the early forties about sharing business, Heinz, who was manager of Bowman's Evanston Branch until 1945 (R. 358), also testified as to the sharing with Borden of the milk business of the Great Lakes Naval Training Center and Fort Sheridan during World War II (R. 361–363), and the fact that he was under standing instructions that Borden and Beloit were to be considered "closed competition" (R. 364–365). Indeed, the court stated, "Portions of Heinz's testimony, if true, would tend to prove the existence of the conspiracy alleged in the complaint" (Finding 18, R. 118). Nor can the appellees succeed in at-

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tributing to other causes the court's action in disregarding this testimony.[2] The court itself was specific in stating both in its memorandum opinion (R. 95) and in its findings of fact (R. 118) that its final judgment was made as a result of choosing between Eggleston, whom the court believed to be "over all, a truthful witness," and Heinz, whom the court had not seen.

After disposing of Mr. Heinz, appellees purport to find that the Government could not be harmed by the exclusion of the Eggleston deposition since (a) its introduction could only serve to impeach Eggleston's testimony and (b) it was really not inconsistent in any event (Br. 26–28). On the first part of this argument, appellees totally disregard the fact that, had the Government been permitted to call the facts in the deposition to Eggleston's attention, his recollection might have been refreshed and his testimony might have been far more helpful to the Government's affirmative case. On the second part, this is hardly the time or place to argue away apparent inconsistencies in the two statements. Maybe Eggleston could have wriggled off of some of the limbs he had crawled out on; maybe not. The

[2] An examination of the portions of the deposition which appear in the printed record (R. 356–368) indicates that the witness was cautions in attaching specific dates to events which occurred ten years or more before; and that he misspoke himself as to a date in 1945 (R. 366); but that there was no such uncertainty as to lead the court to disregard his testimony.

Government should have been given the opportunity of examining him on the prior statement; if it had then failed to impeach him, that was a risk it was entitled to take.

Finally, as a last resort, appellees retreat to the position that permission to introduce a prior contradictory statement of a party's own witness on the basis of surprise is a discretionary matter with the trial court, a determination on which he should not be reversed on appeal (Br. 33–34). We take no issue with the proposition that the decision to permit impeachment of a party's own witness is essentially a matter for the judgment of the trial court. But in this case the court had already determined that the Government should be permitted to impeach its own witness (R. 177–178). The only question remaining, therefore, was whether the particular prior contradictory statements, contained in the deposition, were properly available to the Government to carry out that purpose. The court did not deny the Government the right to use the deposition on discretionary grounds and appellees cannot hide behind the non-reviewability of an exercise of discretion on this appeal. The issue is squarely whether the Government was entitled to confront its own witness with a contradictory deposition which had been given in a separate case and which, although previously protected by seal, was then unsealed pursuant to the rules of the court

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in question. We contend the court was in error in refusing to permit that use of the deposition and that the error grievously impaired the Government's case.

2. THE NEWEY TAPE RECORDINGS

Appellees' major argument is not that the tape recordings were privileged as work-product, but that the Government did not offer them in evidence (Br. 36–39), and failed to make a formal offer of proof with respect to them (Br. 43–44). Neither contention is valid.

(a) It is undisputed that up to the time McConnell released the recordings to Newey, neither the Government nor any other party to this litigation had physical possession of them (Br. 13). Indeed, on the second day of trial, when the Government attempted to subpoena the recordings from McConnell, the court ruled that they were McConnell's work-product and denied the Government the right to subpoena them (R. 165–167). However, as soon as possession had been obtained, Government counsel appeared before Judge Campbell and stated:

> Mr. JINKINSON. Getting back to the Newey proposition, I have subpoenaed Mr. Newey, and in order to refresh his memory, I sent him over to Mr. McConnell's office to see some tapes that he had, that Mr. McConnell had in court here one day. Mr. Newey has the tapes in his possession.

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> It is a question of whether or not this court is going to hear those tapes, and if the Court is going to hear them the Government, of course, would like to have permission from the court to set up in the court room the necessary equipment so that the tapes can be played. [R. 368.]

This, we submit, was in effect an offer of the tapes in evidence. It was so treated by the trial court, which rejected the offer, stating:

> I take it that the witness Newey will refresh himself from those [tapes], if he cares to, or if he needs to, and as far as playing them here, the ruling made at the time Mr. McConnell asked for it still stands.
>
> There is no use of producing the tape recordings here. * * * [R. 369.]

The court's reference to its earlier ruling, namely its refusal to subpoena the recordings on the ground that they were privileged as a lawyer's work product, indicates that the decision was made on the merits. Obviously the court was not concerned with the form of the offer or the question of whether to listen to the recordings or read the transcript. Certainly after this categorical rejection, a further offer would have been futile. Thus appellees' contention that the Government "never offered" the recordings in evidence is without merit.[3]

[3] The fact that the transcripts of the tape recordings were never separately offered in evidence is of no significance.

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Appellees' further contention, that the Government took a position inconsistent with an offer of the recordings in evidence when it refused to allow the appellees to inspect the recordings (Br. 37), is a distortion of the Government's correct legal position. After the court had rejected the offer of the recordings and stated that Newey could, however, use them to refresh his recollection prior to his assuming the witness stand (R. 369), appellees' counsel demanded that they be given an opportunity to inspect the records (R. 370). The Government objected and the court sustained the objection, pointing out that material used to refresh recollection outside the courtroom is not available for inspection by adverse counsel (*ibid.*). The important factor is that this exchange took place after the court had rejected the recordings and is, therefore, in nowise inconsistent with the earlier offer of them in evidence.

(b) Appellees' final contention, that failure of the Government to make a formal offer of proof of the contents of the recordings leaves this Court without sufficient knowledge of their

---

for, as appellees concede, the transcripts were covered by Judge Campbell's original work-product ruling (Br. 36), and his refusal to permit the playing of the recordings for the reason that they were still privileged as work-product (R. 368–369) similarly would have led to his rejection of the transcript. Moreover, since the transcripts were only copies of the best evidence, the tapes, the Government was under no duty to offer the transcripts.

contents to discharge its review functions, is untenable.

The law is clear that a formal offer of proof is not essential to preserve the question of erroneous exclusion of evidence, if it is clear from the record as a whole what the nature of the excluded testimony was. *Hoffman* v. *Palmer*, 129 F. 2d 976, 994 (C. A. 2), affirmed, 318 U. S. 109; *Maguire* v. *Federal Crop Ins. Corp.*, 181 F. 2d 320, 321–322 (C. A. 5); *Meaney* v. *United States*, 112 F. 2d 538, 539 (C. A. 2).[4]

The record in this case clearly demonstrates the significance and nature of the excluded testimony. The tape recordings were taken by Newey and consisted of conversations between Newey and agents of five defendants in this case including Borden, who were alleged to be co-conspirators of the present appellees (R. 166, 373, 382, 387, 395).[5] Newey testified only after

[4] Appellees cite *Herencia* v. *Guzman*, 219 U. S. 44, 46, in support of their position, but that case merely holds that a judgment will not be set aside upon the ground of erroneous exclusion of evidence, if the record, as a whole, does not disclose what the nature or significance of the excluded testimony was.

[5] Appellees' statement that Newey failed to identify the Borden agent (Br. 12) is misleading. During Newey's direct testimony, he stated that he had conversations with Robert Mills of Borden (R. 382). On cross-examination, Newey was asked to describe the physical characteristics of each of the five agents, each of whom he had seen for limited periods of time, a few hours at most, in 1950 (R. 408–409). Newey was then asked whether he recognized any of these agents as

having refreshed his memory from copious notes made from a transcript of the recordings (R. 409–410), and during his testimony he refreshed his recollection from his notes and the transcript (R. 376). Indeed, the trial court found in its memorandum opinion that:

> Newey had little, if any, independent recollection of any of the conversations. After each question was asked, he read extensively from transcripts of the recordings and from personal notes based upon those transcripts. His answers were almost all based upon such an extensive reading. [R. 96.]

In light of this finding by the trial court, it is clear that Newey's direct testimony (R. 370–400) establishes the contents of the excluded recordings sufficiently to enable this Court to perform its limited review function of determining their relevancy and that no further offer of proof was necessary.

Appellees' argument that Newey was so shaken on cross-examination as to make his direct testimony suspect is beside the point. The trial court rejected the testimony not on this ground but because of his lack of independent recollection (R. 95–96). In these circumstances the court's rejection of the recordings was doubly prejudicial to the Government.

---

being in the courtroom (R. 409). Newey stated he did not. Counsel for appellee Borden requested Mr. Mills to stand and Newey stated that he then recognized him (*ibid.*).

3. TESTIMONY EXCLUDED UNDER THE ILLINOIS "DEAD MAN'S" STATUTE

Appellees, in attempting to support the district court's exclusion of Moser's testimony as to his conversations with a deceased Borden official, do not rely at all on the Illinois "dead man's" statute upon which the court's ruling was based. They merely contend that, under applicable Illinois law, testimony as to conversations with a dead man is entitled to "little or no weight" (Br. 51). But such a rule, even assuming its applicability to the instant case, goes only to the weight to be given such evidence, and not to its admissibility. Plainly, it cannot now be used to justify exclusion of relevant evidence.

4. THE DISMISSAL OF THE PORTION OF THE COMPLAINT CHARGING VIOLATIONS OF THE CLAYTON ACT

Appellees, relying upon *United States* v. *W. T. Grant Co.*, 345 U. S. 629, argue that the district court dismissed the portion of the complaint which sought relief against violations of the Clayton Act because it "found no cognizable danger of current violation" thereof (Br. 55), and that the Government has not shown that the chancellor abused his discretion in so doing (Br. 54). They contend that the Government had shown only "some old violations" of the Act (*ibid.*), and that the record contains no evidence of violations by any of the appellees "during a period of sev-

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eral years preceding" the entry of the *Dean* decree (Br. 15).

In taking this position appellees are relying upon the very reasons which the district court specifically refused to adopt. It is clear that the district court did not base its dismissal upon any finding that the only violations were old ones, or that there was no cognizable danger of recurrence, but relied upon the existence of the *Dean* decree which, in the court's view, "effectively enjoined" appellees from further violations of the Clayton Act (R. 111; Fdg. 38, R. 123; Conclusion of Law 9, R. 124–125). Indeed, the district court denied a motion by appellees Bowman and Ridgeview to amend the findings so as to make the judgment rest on the remoteness of the violations and the unlikelihood of recurrence (R. 125, 150). The court refused to make the finding that "There is no substantial credible evidence tending to prove that either Bowman, Ridgeview, Borden, or Belmont has *in the past five years* performed any act violative of Section 2 (a) of the Clayton Act, as amended, which is not now prohibited by the [*Dean*] decree" (R. 126). [Emphasis added.][6]

[6] At the same time the court rejected the following proposed additional conclusion of law which, appellees asserted (R. 127), was based on the *Grant* case:

"Before exercising its power to grant injunctive relief, the Court must determine that there exists some cognizable

In short, Judge Campbell did not make any determination that the Government had not shown the need for injunctive relief, but rested his decision upon the erroneous view that existence of a private decree barred the Government from obtaining relief in its own suit. As we pointed out in our main brief (pp. 52–54), a private decree does not adequately protect the public against violations of the antitrust laws. In view of the serious violations of Section 2 (a) which the record shows,[7] we submit that the district court clearly erred in holding that the *Dean* decree required dismissal of the complaint in the instant case.

---

danger of recurrent violations of law. Proof of past violations of the Clayton Act is not in itself sufficient to warrant the granting of injunctive relief if there is no significant threat of future violation."

[7] For example, from 1928 or 1929 to 1942, appellee Bowman gave the A. & P. stores a 5% discount on milk purchases (R. 291–292). After A. & P. informed Bowman in the Spring of 1942 that it was transferring its business (R. 292), Bowman offered A. & P. an 11% discount to hold the business (R. 296) and also paid A. & P. $50,000 to make up the difference between 5% and 11% for past years (R. 300, 303–304). Newey's testimony indicates that, as recently as 1951, appellee Borden was continuing to offer storekeepers gratuities in return for their business (R. 386).

Because of Judge Campbell's holding (R. 108, 121–122) that the Government had shown *prima facie* violations of the Clayton Act, and in light of the limited issues raised by the Government's appeal, the record before this Court contains only a small portion of the evidence relating to the Clayton Act violations.

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5. CONTENTIONS OF APPELLEE BELOIT

Appellee Beloit has filed a separate brief in which it contends that, no matter what the outcome of this appeal may be as to the other appellees, the trial court's judgment of dismissal as to it should be affirmed (Beloit, Br. 9). It argues that, in order to obtain a reversal of the judgment in its favor, the Government must show that the excluded evidence itself would have established Beloit's participation in the conspiracy.

The Government's burden is not that great. The district court held that the Government had failed to show the existence of *any* conspiracy, and we contend that it made that finding only because it had improperly excluded important elements of the Government's case. If that contention is correct, the case must be remanded for a new trial. The issue whether the Government's evidence will be sufficient to link Beloit to the conspiracy (assuming that the Government will be able to prove conspiracy on the new trial) is, we submit, for initial determination by the trial court in the light of all the facts developed in the new trial, and cannot now be determined by this Court *in vacuo*.

CONCLUSION

The judgment of the district court should be reversed, and the cause remanded for a new trial.

Respectfully submitted.

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APRIL 1954.

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HAROLD B. WILLEY,

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1953

No. 464

UNITED STATES OF AMERICA,

Appellant,

vs.

THE BORDEN COMPANY, BOWMAN DAIRY COMPANY, BELOIT DAIRY COMPANY, ET AL.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF ILLINOIS

STATEMENT OF BELOIT DAIRY COMPANY OPPOSING JURISDICTION AND MOTION TO DISMISS OR AFFIRM

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Counsel for Appellee,
Beloit Dairy Company.

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UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

No. 51 C 947

UNITED STATES OF AMERICA,
Plaintiff,

vs.

THE BORDEN COMPANY, ET AL.,
Defendants

REPLY OF BELOIT DAIRY COMPANY TO APPELLANT'S STATEMENT AS TO JURISDICTION, AND SEPARATE MOTION OF BELOIT DAIRY COMPANY TO DISMISS IT AS AN APPELLEE AND TO AFFIRM JUDGMENT BELOW DISMISSING COMPLAINT AS TO IT.

Appellee Beloit Dairy Company is in a unique position in this case, because none of the four questions raised by appellant would apply to it, whichever way the Court might decide them, if it were to take the case on appeal. The questions presented by appellant do not concern Beloit and even if well taken as to the other appellees, afford no basis for disturbing the judgment below in its favor.

Beloit has joined in the other appellees' motion to dismiss the entire appeal or to affirm the judgment below in all

respects, for the reasons set forth therein. In addition, Beloit in this separate statement presents the grounds, specially applicable to it, upon which it opposes appellant's contentions as to the jurisdiction of the court and moves that it be dismissed as an appellee and that the judgment of dismissal below be affirmed as to Beloit.

Jurisdiction

The judgment of the district court was entered on June 17, 1953. The judgment dismissed Beloit Dairy Company as a defendant herein.

One hundred and seven days later, on October 2, 1953, the Government filed its Petition for Appeal, naming as appellees all five of the defendants which stood trial in the court below.

The Government relies, in its Statement as to Jurisdiction (p. 2) upon Section 2 of the Expediting Act of February 11, 1903, 32 Stat. 823, 15 U. S. C. 29, as amended by Section 17 of the Act of June 25, 1948, 62 Stat. 869, which provides:

> "In every suit in equity brought in any district court of the United States under any of said Acts [including the Sherman Act], wherein the United States is complainant *an appeal from the final decree of the district court will lie only to the Supreme Court and must be taken within sixty days from the entry thereof* * * *." (Emphasis added.)

It appears on the face of the record that, unless tolled, the time for the Government's appeal had elapsed forty-seven days before this appeal was taken. It is the contention of Beloit Dairy Company that the time was not tolled as to the judgment dismissing it as a defendant in the case.

The Expediting Act in terms does not authorize tolling of the sixty-day limitation on the right to appeal from a

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final decree of a district court in a Sherman Act case, but in practice, a pending motion to amend the findings, the necessary effect of which is to deprive the judgment of "that finality which is necessary to appealability", (*Leishman* v. *Associated Electric Co.*, 318 U. S. 203, 205 (1943)) tolls the time limit until sixty days after the district court rules on such a motion. *United States* v. *Crescent Amusement Co.*, 323 U. S. 173, 177 (1944). The reason for this holding is (323 U. S., pp. 177-178):

> "The motion to amend the findings tolled the time to appeal if it was not addressed to 'mere matters of form but raised questions of substance,' e. g., if it sought a 'reconsideration of certain basic findings of fact and the alteration of the conclusions of the court.' *Leishman* v. *Associated Electric Co.*, 318 U. S. 203, 205 * * *."

The reason assigned in *Crescent* for tolling the time for taking the appeal is to be particularly noted: the motion which was pending when the statutory time ran out was a motion which "sought a 'reconsideration of certain basic findings of fact and the alteration of the conclusions of the court.'" Likewise, in *Leishman*, the time to appeal (under a different statute) was tolled by a motion because "the necessary effect was to ask that rights already adjudicated be altered." (318 U. S. 205.)

The "rights already adjudicated" between the United States and Beloit Dairy Company in the instant case were: the United States had no right to equitable relief against Beloit under Section 1 of the Sherman Act; the United States had no right to equitable relief against Beloit under Section 2 of the Sherman Act; and the United States had no right to equitable relief against Beloit under Section 2(a) of the Clayton Act, as amended by the Robinson-Pat-

man Act. That these were the rights adjudicated as between these parties is shown by three things:

a. Beloit's motion to dismiss, dictated into the Record on March 24, 1953,[1] which states:

> "* * * There comes now defendant, Beloit Dairy Company, at the close of plaintiff's case, and after the plaintiff has rested, and moves the Court, pursuant to Rule 41(b) of the Federal Rules of Civil Procedure, for *an order and a judgment of dismissal of the Beloit Dairy Company as defendant herein,* for the following reasons:
>
> "1. That plaintiff has failed to establish facts which under the law entitle it to the relief requested against Beloit Dairy Company.
>
> "2. That plaintiff has failed to prove the allegations of the complaint, that Beloit Dairy Company was a party to or participated in a combination or conspiracy to restrain or monopolize sales of fluid milk in interstate commerce to wholesale customers and public institutions in the Chicago area, in violation of Sections 1 and 2 of the Sherman Act.
>
> "3. That plaintiff has failed to prove the allegations of the complaint, that this defendant, Beloit Dairy Company, in combination with the other defendants have monopolized the sale of fluid milk in interstate commerce to wholesale customers and public institutions in the Chicago area in violation of Section 2 of the Sherman Act.
>
> "4. That plaintiff has failed to prove the allegations of the complaint that this defendant, Beloit Dairy Company, has granted discriminatory prices, rebates, discounts, or allowances in sales of fluid milk in interstate commerce to wholesale customers in the Chicago area, as alleged in the complaint in violation of Section 2(a) of the Clayton Act.

[1] Trial Transcript 2415-2417.

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"And 5. That the plaintiff has failed to prove any imminent and immediate danger of public injury by the alleged activities of this defendant, entitling plaintiff to injunctive relief." (Emphasis added.)

b. The trial court's Memorandum and Order, rendered March 30, 1953, (*United States* v. *Borden Co.*, 111 F. Supp. 562, 580) which states:

"The *motion of each defendant* to dismiss that part of the complaint which charges violations of Sections 1 and 2 of the Sherman Act must be granted." (Emphasis added.)

which further states (111 F. Supp. at 580):

"In the instant case, the Government has proved the occurrence of only one sale by the Beloit Dairy Company; that was the sale of certain dairy products to the Eitel Restaurant in Chicago in 1947 (Exhibit 738). With respect to Beloit Dairy Company, therefore, the Government has not shown a right to relief under Section 2(a) of the Clayton Act. *Beloit's motion to dismiss the complaint must therefore be granted in its entirety.*" (Emphasis added.)

and which further states (111 F. Supp. at 582-583):

"For the reasons stated in this memorandum *the motion of each defendant* to dismiss the complaint is granted in its entirety, and, accordingly, the complaint is dismissed."

c. The judgment entered by the trial court on June 17, 1953,[2] on the basis of its Findings of Fact numbers 34 and 35 (that there was no evidence competent as to Beloit that it was a party to a conspiracy,[3] and there was proof of only

---

[2] Item 8 of Praecipe.

[3] Finding number 34, fully set out at p. 7 *infra*.

one sale by Beloit)[4] and its conclusions of law, ordered, adjudged and decreed:

> "1. That *the motions to dismiss be and are hereby granted;*
> "2. That the complaint be and is hereby dismissed as against said defendants;
> "3. That judgment on the merits be and is hereby entered against the plaintiff and in favor of said defendants." (Emphasis added.)

There was no action taken after June 17, 1953 by either the plaintiff or the trial court which might have led to a "reconsideration of certain basic findings of fact" (*Crescent* and *Leishman* cases, quoted at p. 3, , *supra*) as to Beloit's innocence, or "the alteration of the conclusions of the court" (*idem.*) as to Beloit's non-liability, and hence there was no tolling of the time within which to appeal from the judgment dismissing Beloit. If plaintiff had questioned any part of the proceedings which led to the findings, conclusions, and judgment concerning Beloit (which it certainly could have done under the Rules) the time to appeal from the dismissal of Beloit might have been tolled, as it apparently was with respect to the other four defendants. However, the following were the only points raised in the Government's June 26, 1953 motion which asked for "a new trial or, in the alternative, that the judgment of June 17, 1953 be opened, additional testimony taken, the findings of fact and conclusions of law amended and a new judgment entered":

1. The first point in the motion was:

> "That the Court erred in refusing to permit plaintiff to use the deposition of the witness Hezekiah C. Eggleston, taken on March 23, 1951 in the case of *Dean Milk Company* v. *American Processing & Sales Com-*

[4] Finding number 35, fully set out at p. 9 *infra.*

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pany, et al., No. 49 C 1159, for the purpose of impeaching the witness Eggleston during his testimony in the trial of this case. The Court ruled that the deposition was under seal and not available to plaintiff."

This deposition could not have been used against Beloit. Beloit was not a party to the *Dean Milk Company* case, had no notice of the taking of the deposition, and was not represented thereat.[5]

Rule 26(d), F. R. C. P., restricts the permitted use of depositions, whether for evidence or for impeachment, in the following terms:

> "*Use of Depositions.* At the trial * * *, any part or all of a deposition, so far as admissible under the rules of evidence, may be *used against any party who was present or represented at the taking of the deposition or who had due notice thereof,* in accordance with any one of the following provisions:
>
> "(1) Any deposition may be used by any party for the purpose of contradicting or impeaching the testimony of deponent as a witness." (Emphasis supplied)

Clearly, the district court could not have permitted use of the Eggleston deposition against Beloit so this ground of plaintiff's motion did not seek a reconsideration of Finding of Fact number 34[6] that:

> "All of the evidence competent as to Beloit fails to establish the existence of a conspiracy, as alleged in the complaint, or the participation therein by Beloit."

2. The second point in the Government's motion was:

> "That the witness Hezekiah C. Eggleston testified falsely to material facts concerning his participation,

[5] Plaintiff's offer of Proof (Item 4 of Praecipe) states only that "counsel for the defendants Bowman Dairy and Borden Dairy were present" when the deposition was taken. (See also, Trial Transcript 2353)

[6] Item 8 of Praecipe.

as Sales Manager and Vice-President of the Bowman Dairy Company, in the conspiracy charged in the complaint. Exhibits 5 and 6 attached hereto and Appendix I to plaintiff's Brief in Spport of this Motion relate to some contradictions between the testimony of the witness Eggleston at this trial and statements made by Eggleston on former occasions."

Neither the testimony of Eggleston during the trial nor the alleged statements in Exhibits 5 and 6 attached to plaintiff's motion [7] and Appendix I to plaintiff's Brief in Support of the Motion [8] made any mention of Beloit.

3. The Government's third ground for a new trial was:

"That the Court erred in refusing to allow plaintiff to play in open court recordings of interviews between the witness Paul D. Newey and various representatives of defendants. These interviews contained many admissions by agents of the defendants relating to the issue of conspiracy which was decisive in this case."

The witness Newey had no conversation with any Beloit representative.[9]

4. Plaintiff's next complaint was:

"That the Court erred in excluding the offered testimony of the witnesses Eggleston and Moser relating to conversations between these witnesses and deceased employees and officers of defendants relating to the fact of conspiracy charged in the complaint, the decisive issue in this case."

The offered testimony of the witnesses Eggleston [10] and

---

[7] Item 11 of Praecipe.

[8] Not added to the Record below or on this Appeal by Government counsel.

[9] Tr. 2353.

[10] Plaintiff made no offer of proof pursuant to Rule 43, F.R.C.P. regarding this conversation and nothing in the pertinent pages of the transcript (Tr. 638-639, 769-770) indicates that Beloit was in any way mentioned in the supposed conversation between Bowman and Borden employees.

Moser [11] include no references to Beloit, and contain no evidence competent as to Beloit.

5. Plaintiff's fifth objection was:

> "That the Court erred in limiting plaintiff's proof to the period subsequent to 1940 when testimony of witnesses Heinz, Egglestor, and others was offered for the purpose of showing that the origins of the present conspiracy antedated the year 1940."

The Government has not included any objection to the order limiting proofs to the twelve and one-half years prior to the trial in this appeal. There was no evidence competent as to Beloit offered at the trial with respect to the period before 1940.

6. The final point in the Government's motion was:

> "That the Court erred in holding that defendants Bowman and Borden should not be required to present their defenses to the violations of Section 2(a) of the Clayton Act, which the Court found were shown by plaintiff, on the ground that the decree which was entered by another judge of this court in the case of *Dean Milk Company* v. *American Processing & Sales Company, et al.*, 48 C 1159, on December 3, 1952, enjoins these defendants from performing future violations of Section 2(a) of the Clayton Act."

The trial court's decision that defendants Bowman and Borden should not be required to present their defenses to the price discrimination charges against them does not apply to Beloit in any way. The court's Finding of Fact number 35,[12] that "plaintiff has offered competent and credible evidence of only one sale by Beloit to a wholesale customer; that was the sale of certain dairy products to the Eitel Restaurant in Chicago in 1947" was not affected by this part of plaintiff's motion. This was the finding on which

[11] Item 5 of Praecipe.
[12] Item 8 of Praecipe.

the court based its judgment that no price discrimination by Beloit had been proved:

In view of the fact, as above demonstrated, that the Government made no attack upon the judgment against it on its claims for relief against Beloit Dairy Company, its motion filed on June 26 did not operate to toll the time within which it might have appealed from the judgment granting Beloit's motion to dismiss. Cf. *Federal Trade Commission* v. *Minneapolis-Honeywell Regulator Company*, 344 U. S. 206 (1952).

Beloit Dairy Company therefore respectfully submits that, as to it, the Government has failed to show grounds upon which the court has jurisdiction to entertain an appeal from the judgment dismissing Beloit in the court below.

We shall now show in addition, that the Government has not actually appealed from the judgment dismissing Beloit, and should not have named Beloit as an appellee.

Motion of Beloit Dairy Company To Dismiss Appeal or Affirm Judgment Below

Beloit Dairy Company, in addition to joining with its co-appellees in the Motion to Dismiss or to Affirm filed this day, hereby moves that this appeal be dismissed as to it, and that the judgment dismissing it entered by the district court on June 17, 1953, be affirmed, on the ground that no substantial question relating to said judgment is presented on this appeal.

The only references to Beloit in any of the papers filed by the plaintiff in perfecting its appeal are in the lists of defendants to which the citation and the statement calling attention to the provisions of Supreme Court Rule 12(3), are addressed and in a list of the defendants which stood trial, describing Beloit as "one small dairy, Beloit Dairy Co.—" at page 5 of the statement as to jurisdiction.

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The Government presents to the court four of the six points which it included in its motion filed on June 26, 1953 in the district court:

1. Refusal of the trial court to permit appellant to use the deposition of H. C. Eggleston, at the taking of which Beloit Dairy Company had no notice and was not represented, and which was taken in a case to which Beloit Dairy Company was not a party (see discussion and references, *supra*, at pp. 6-8).

2. The fact that certain tape recordings containing no competent evidence as to Beloit and no statements by agents of Beloit were not used as evidence. (See discussion and references, *supra*, at p. 8).

3. The exclusion of testimony, which contained no references to Beloit, as to two witnesses' conversations with a deceased agent of another defendant. (See discussion and references *supra*, at pp. 8-9).

4. The trial court's reference to the decree in another case, to which Beloit was not a party, as a reason for refusing to grant the Government's relief against selling at discriminatory prices, by other defendants but not by Beloit. (See discussion and references *supra*, at pp. 9-10).

In addition to the reasons stated in the joint motion of Beloit and the other appellees to dismiss or to affirm, Beloit cites the fact that none of the rulings and actions of the trial court to which the Government objects on this appeal excluded from the record any evidence competent as to Beloit or resulted in any different judgment on the Government's claims against Beloit than would have ensued if the trial court had done exactly what the Government now contends it should have done.

Where there is a failure to prove a cause of action against one of several defendants, justice requires the court to deal separately with the rights of such a defendant, regardless of whether the judgment of the trial court is joint or several.

Pennsylvania Railroad v. *Jones,* 155 U. S. 333, 354, (1894); *Washington Gas Light Co.* v. *Lansden,* 172 U. S. 534 (1899). In the instant case, the trial court entered separate findings as to Beloit and granted the several motions to dismiss of Beloit and the other defendants, making it easy to segregate the judgment in favor of Beloit from the rest of the case.

No substantial question, and indeed no question whatsoever is presented to the Supreme Court by the Government as grounds for reviewing here the judgment of the trial court against the United States and in favor of Beloit Dairy Company.

It is respectfully submitted, therefore, that the said judgment of the trial court should be affirmed or, in the alternative, that the appeal should be dismissed as to this defendant.

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CHARLES L. STEWART, JR.,
Attorneys for Defendant Beloit Dairy Company.

NOV 12 1953
HAROLD B. WILLEY, Clerk

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1953

No. 464

UNITED STATES OF AMERICA,
Appellant,

vs.

THE BORDEN COMPANY, BOWMAN DAIRY COMPANY, BELOIT DAIRY COMPANY, ET AL.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF ILLINOIS

MOTION TO DISMISS OR AFFIRM

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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1953

No. 464

UNITED STATES OF AMERICA,
Plaintiff-Appellant,

vs.

THE BORDEN COMPANY, ET AL.,
Defendants-Appellees.

MOTION TO DISMISS OR TO AFFIRM

Appellees, pursuant to Rule 12, paragraph 3, of the Rules of the Supreme Court of the United States, move the Court to dismiss the appeal or, in the alternative, to affirm the judgment of the District Court, on the ground that no substantial questions are presented by the appeal.

This is a direct appeal, pursuant to Section 2 of the Expediting Act of February 11, 1903, 32 Stat. 823, 15 U. S. C. 29, as amended by Section 17 of the Act of June 25, 1948, 62 Stat. 869, from the final judgment entered on June 17, 1953, by the District Court and that court's denial of appellant's motion for a new trial on August 6, 1953. Appeal was allowed on October 2, 1953, and appeal papers were served on appellees on the same day.

There are four "questions presented" by appellant's statement as to jurisdiction. Three of these questions in-

volve rulings on evidence and the fourth pertains to an exercise of the trial court's discretion which was strictly in accord with a recent controlling decision of this Court.

None of the trial court's findings of fact and conclusions of law are attacked on this appeal. Nor does appellant challenge the trial court's ultimate conclusion that the voluminous evidence introduced by appellant was insufficient to support its allegations of violations of the Sherman Act. Rather, it is appellant's position that the trial court would have reached a contrary conclusion if it had not "improperly excluded the vitals of the government's case."

Each of the three evidentiary rulings was proper. Moreover, even if all the proffered evidence had been received, nothing of substance would have been added to the record. The appellant's offers of proof, far from containing any "vital" evidence, merely covered cumulative matters which had already been thoroughly and carefully considered by the District Court.

The Government filed the instant civil action on June 18, 1951. The complaint alleged violations of Sections 1 and 2 of the Sherman Act and Section 2(a) of the Clayton Act. On February 12, 1953, and continuing daily thereafter to March 4, 1953, a pre-trial conference was held. During this conference five of the defendants and the Government reached agreement upon the terms of a consent decree which was entered on February 19, 1953.

As a result of the pre-trial conference, the court entered a lengthy pre-trial order containing numerous agreements of fact and agreements on evidentiary matters and issues.[1] The court also entered an order limiting the proof with certain exceptions to a period subsequent to September 16, 1940, the date on which a consent decree was entered by

[1] Trial Transcript 2823-2824.

the same District Court in the case entitled *United States* vs. *Borden, et al.*, No. 2088.[2]

The trial began on March 4, 1953, and the Government rested on March 23, 1953—fourteen trial days later. During this time the Government offered over fifteen hundred exhibits of which over one thousand were received in evidence, and called over sixty-five witnesses in support of its case. At the close of the Government's case, each of the appellees made a motion to dismiss. Arguments on these motions were heard on March 24, 25 and 26, 1953. On March 30, 1953, the court announced that, having weighed the evidence in accordance with Rule 41(b) of the Federal Rules of Civil Procedure, the court had decided that the Government's evidence did not warrant the relief sought in the complaint.[3] Findings of Fact, Conclusions of Law, and Judgment were entered on June 17, 1953. The court's exhaustive opinion discussing the evidence is found at page 2818 of the Trial Transcript and is reported at 111 F. Supp. 562.

I

The first question presented by appellant is stated as follows:

> Whether the District Court erred in not allowing the Government to use a deposition, taken in another case, for the purpose of showing that part of the testimony given by a crucial Government witness, who proved hostile, was contrary to statements made in his earlier deposition.

The trial court properly refused to permit appellant to use the deposition of H. C. Eggleston in an effort to impeach his trial testimony. The first time the Government offered to use this deposition, the trial court held that it was un-

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[2] This order appears at ——— of the Record.

[3] Trial Transcript 2826.

available, the judge presiding in the action in which the deposition was taken [4] having previously ruled that it was under seal and that the seal could not be broken at the request of the Government. This ruling is not before this Court.[5]

The attack is on the trial court's second refusal to permit appellant to use Eggleston's deposition—in other words, upon the trial court's refusal to reverse a ruling which was admittedly proper when made. Specifically, appellant attacks the court's rejection of its offer of proof filed on March 10, 1953, containing selected excerpts from the deposition. Before making this offer, appellant had examined the witness Eggleston for several days, using numerous documents and a sworn statement which Eggleston had given to the plaintiff's attorney in the case in which the deposition was taken, in its unsuccessful attempt to impeach his credibility.[6]

The deposition was entirely consistent with Eggleston's trial testimony. A comparison of this trial testimony with the offer of proof shows that: (1) much of the offer actually corroborates without contradiction portions of Eggleston's trial testimony; (2) substantially all of the offer pertains to a time prior to the 1940 consent decree and therefore was immaterial under the court's order limiting the plaintiff's

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[4] *Dean Milk Company* v. *American Processing and Sales Company, et al.*, No. 49 C 1159 (D.C., N.D. Ill., E.D.), to which Beloit Dairy Company was not a party.

[5] In its motion for a new trial, appellant did not attack the trial court's first ruling that the deposition was not available. It had previously conceded that the ruling of the judge in the *Dean* case that the seal could not be broken at the request of the Government "probably was correct." (Trial Transcript 158.) It is not surprising that appellant does not repeat the argument made in the trial court that ". . . the sovereign state of the United States has a right to procure its evidence wherever it can, and I don't think any court should shut off the United States which is here trying to enforce a statute . . ." (Trial Transcript 159.)

[6] See Trial Transcript 486-847.

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proof,[7] and (3) the offer of proof merely duplicates material in the Eggleston affidavit and in the documents which appellant did use in its efforts at impeachment. The affidavit was prepared by counsel for plaintiff in the *Dean* case as the basis for his examination of the witness Eggleston in the deposition and presumably contains all of the material covered in the deposition. (Trial Transcript 176-177.) The trial court appraised the offer of proof in the light of these controlling factors and came to the considered conclusion that Eggleston was a credible witness. When this Court studies the testimony, the offer of proof, and defendants' objections to that offer, it will come to the same conclusion.

When due regard is given to the trial court's familiarity with the full trial record and its extended opportunity to study Eggleston's appearance and demeanor on the witness stand, it seems plain that this issue presents no substantial basis for appellate review.

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[7] Mr. Eggleston's employment by the Bowman Dairy Company terminated approximately ten years before he took the witness stand. (Trial Transcript 407-408.) Mr. Philippi, the only other Bowman official referred to in the offer of proof, left the company in 1941. Trial Transcript 539.) Substantially all of the questions and answers quoted in the offer of proof relate to the period prior to 1940. In some instances the time is expressly identified (see e.g. offer of proof pages 7-8 quoting from deposition pages 47-49 pertaining to 1938 and 1939, and offer of proof page 9 quoting from deposition pages 52-54 pertaining to 1932 or 1933), and in others it is plain from the context that the witness was discussing a time prior to 1940 (see e.g. offer of proof pages 3-4 quoting from deposition pages 32-33 pertaining to the time when "Dean Milk Company came into Chicago".) Even if that were not plain, answers not specific as to time are obviously not necessarily contradicted by trial testimony specifically confined to the period after the entry of the consent decree in 1940. The only portion of the deposition which identifies a time after 1940 related to negotiations between Bowman and A & P in 1942; those negotiations were fully described by Mr. Eggleston at the trial in a manner completely consistent with his deposition, and did not remotely tend to prove any "conspiratorial acts" between Bowman and any other defendant. (See Trial Transcript 723-753.)

II

The second question presented by appellant is phrased as follows:

> Whether the court erred in ruling that certain tape recordings of statements made by various agents of defendants, which the court excluded, were within the privilege attaching to the "work product" of an attorney and that such privilege had not been waived.

The witness Newey testified that he made tape recordings of interviews with sales representatives of various dairies. Except for one salesman whom Newey failed to identify in court (Trial Transcript 2320-2321), none of the interviews was with a representative of any of the appellees. A verbatim transcript of each tape was made. The witness Newey had all of these transcripts with him in the court room during his direct examination [8] and used one of them to refresh his memory while testifying.[9] Further, these transcripts were shown by Newey to appellant's counsel [10] and were admittedly in appellant's possession along with the tapes.[11] Thus, the transcripts were available to appellant and were used by the witness Newey to refresh his recollection.

Except for one transcript, neither the tapes nor the transcripts have ever been available to appellees. Appellees were denied the right to see them by Judge Igoe in the *Dean* case on the ground that they constituted the work product of Mr. McConnell, attorney for the plaintiff in that case. When this same material was subpoenaed by appellant in this case, the trial court respected Judge Igoe's

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[8] Trial Transcript 2310-2311; 2323.

[9] Trial Transcript 2241.

[10] Trial Transcript 2323.

[11] Exhibit 7 attached to plaintiff's motion for a new trial.

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ruling and Mr. McConnell's claim of privilege and refused to order production of the material. The claim of privilege was never waived by Mr. McConnell,[12] and Government counsel violently objected to appellee's demand that they be given an opportunity to see any transcript or tape used by Newey to refresh his recollection.[13]

Subsequently, appellant obtained possession of both the tapes and transcripts, but for reasons known only to itself, did not offer any of this material in evidence. The record does not support the assertion that they contain "vital" or "critical" evidence. Indeed, it demonstrates the contrary. The witness Newey admitted on cross-examination that he picked out the parts of the conversations he thought would help out appellant's case.[14] Furthermore, the cross-examination of the witness Newey based upon the one transcript available to defendants clearly shows that Newey's testimony did not even reflect the true content of that part of

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[12] Early in the trial, appellant's counsel informed the court that it only intended to use the tapes to substantiate the testimony of the witness Newey. (Trial Transcript 172.) Two days before appellant was to rest its case, it showed the McConnell letter to the court. (Trial Transcript 2211-2214.) This letter was at most a delegation of authority to Newey to waive McConnell's privilege, if necessary, "for the purpose of protecting yourself as a witness", and to deliver the tapes or transcripts to the defendants. Newey never exercised any such authority and the Government objected to such delivery to the defendants. In any event, the letter certainly was not an unequivocal waiver of the privilege. McConnell was appellant's witness and could have been recalled to clear up any misunderstanding concerning the meaning of this letter. Appellant completely failed to do so and, furthermore, neither authenticated the letter nor offered it in evidence.

[13] Trial Transcript 2213:

"Mr. Ball: We shall demand, of course, the defendants, that we be given the opportunity to see the documents or material that the witness is permitted to use to refresh his recollection.

"Mr. Jinkinson: Of course, we violently object."

[14] Trial Transcript 2322.

his conversation with one of the defendant's salesmen which he purported to relate on direct examination.[15]

Instead of offering the tapes or transcripts in evidence appellant presumably chose to rely upon the testimony of the witness Newey. With respect to his testimony, the court found:

> "At the trial, witness Newey was without any apparent present recollection of his conversations with the defendants' representatives. He used notes, assertedly to refresh his recollection, but his testimony appeared to be and was largely a paraphrase of these notes. These notes were not his past recollection recorded, but were made by him shortly before his appearance on the stand from a reading of transcripts of the various tape recordings. One of these transcripts was also used to refresh his memory. The aforesaid notes were admittedly extracted from the transcripts of the tape recordings to suit plaintiff's convenience. The court completely disregards the testimony of witness Newey and holds that his testimony is valueless."[16]

Thus, appellant now asks this Court to reverse the judgment below on the basis of material it failed to offer in evidence and concerning which it failed to make any offer of proof. The one transcript available to appellees demonstrates the need for such an offer inasmuch as the transcript did not corroborate the testimony of Newey and contained a great deal of material Newey purposely disregarded in preparing to testify.

It has been repeatedly held that a party must make an offer of proof with respect to excluded evidence to preserve the ruling on appeal so the reviewing court is able to determine whether the ruling involved reversible error.[17] This, appellant in the instant situation, completely failed to do.

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[15] Trial Transcript 2344-2353.

[16] Findings of Fact, paragraph 20.

[17] See e. g. *Herencia* v. *Guzman*, 219 U.S. 44, 46 (1910).

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Appellant has admitted that it failed to offer the tapes but stated by way of excuse that inasmuch as the trial court refused to allow it to set up certain sound reproducing equipment in the court room, such an offer would have been useless.[18] This excuse seems to be predicated on the concept that if the court refused to allow appellant to install the reproducing equipment the offer would be worthless. However, even this type of excuse completely overlooks the fact that appellant had in its possession the transcripts and could have offered them in evidence. Without such an offer, this Court does not have before it the information necessary to enable it to determine whether the alleged exclusion constituted reversible error.

III

The third question presented by appellant is phrased as follows:

> Whether the court properly held inadmissible, under the Illinois "dead man's" statutes, testimony as to conversations with a deceased agent of a defendant.

Appellant's sole contention here is that neither Eggleston nor Moser was "a party to the action" or "a party to a contract the subject of litigation". Appellant did not raise the point during the trial. Instead, appellant took the position that the Illinois rule "doesn't apply unless it is against the dead man's estate or interests".[19] This position was plainly erroneous and rejected by the trial court. This is apparently conceded by appellant, for it has now abandoned its original position.

If the proffered testimony of the witness Moser is to be viewed as showing a contract between Moser and the de-

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[18] See Exhibit 7 attached to plaintiff's motion for a new trial.

[19] Trial Transcript 29.

ceased Baril not to solicit each other's customers, it would appear that the testimony falls within the ban of the Illinois rule. Under appellant's own statement of the rule, it applies to "a party to a contract the subject of litigation", and if there was an agreement between the witness Moser and appellee Borden, such contract would have been directly affected by the decree sought by appellant in this case and thus Moser would have been a person interested in the event of the suit.

Furthermore, the assertion that the excluded evidence was of "vital" importance is again unsupported by the record. Appellant's only offer of proof with respect to the rulings complained of was as to the witness Moser. The offer of proof as to the witness Eggleston does not include any of the material excluded by the trial court under the so-called "dead man's" statute.[20] The appellant had the option, in lieu of an offer of the evidence sought in an action tried without a jury, to request the court to take and report the evidence in full in accordance with the provision of Rule 43(c) of the Rules of Civil Procedure for the United States District Courts. This option was designed to cover a situation where the party submitting the testimony was not sufficiently certain of its nature to make an accurate offer. The appellant in the instant case failed to exercise either option and, in consequence, has failed to properly preserve the ruling on the excluded evidence for review.

The Moser offer of proof did not show any violation of law by appellee Borden and the witness Moser, nor did it tend to prove the existence of the conspiracy charged. Even if this offer of proof is viewed as showing a unilateral threat by Borden to take customers from Moser if

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[20] Compare Eggleston offer of proof with Trial Transcript 638-639 and 769-770.

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he continued to bid on a public institution previously served by Borden, it is no more significant than several similar unilateral threats by Beloit, all of which are in the record and were evaluated by the lower court in rendering its judgment.[21] Such a threat would not tend to prove the conspiracy which plaintiff sought to establish, since nothing in the offer of proof or record indicates that Borden was acting in concert with other defendants. The lower court held that such "isolated instances cannot establish the existence of a conspiracy among ten defendant dairies."[22]

Thus, appellant relies, as part of the "vitals" of its case, on one bit of excluded evidence offered through the witness Moser which is at best cumulative and, therefore, should not under any circumstances, be considered reversible error.

IV

The final question presented by appellant is whether the District Court was justified in refusing to grant equitable relief to the Government. In explanation of its refusal, the trial court stated in Conclusion of Law No. 9:

> "Since the violations of the Clayton Act described in the complaint and shown at the trial are, for the most part, old violations, and since the Dean decree assures that there will be no new violations, this court shall not grant the injunctive relief sought by plaintiff under Section 2(a) of the Clayton Act." (Findings of Fact, Conclusions of Law and Judgment, page 22.)

The record shows no threat whatever of future violations of the Clayton Act. Accordingly, there is no substance to the contention that the Chancellor abused his discretion in determining that there was no need for an injunction. "The sole function of an action for injunction is to forestall future

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[21] See 111 F. Supp. at 578 and Findings of Fact, paragraphs 27 and 28.

[22] 111 F. Supp. at 578.

violations." *United States* v. *Oregon State Medical Society*, 343 U. S. 326, 333 (1952).

This Court's recent decision in *United States* v. *W. T. Grant Co.*, 345 U. S. 629 (1953), is directly in point. In that case the United States proved violations of Section 8 of the Clayton Act which were terminated after suit was commenced. After noting that the trial court's *power* to enter an injunction survived the discontinuance of the illegal conduct, this Court turned to the separate question of whether the trial court had properly exercised its discretion when it refused to grant relief requested by the United States. On this issue, this Court stated:

> ". . . the moving party must satisfy the court that relief is needed. The necessary determination is that there exists some cognizable danger of recurrent violation, something more than the mere possibility which serves to keep the case alive. The chancellor's decision is based on all the circumstances; his discretion is necessarily broad and a strong showing of abuse must be made to reverse it." (345 U. S. at page 633.)

The fact that appellant is not a party to the *Dean* decree is immaterial. There was no decree at all in the *Grant* case. The question is whether there is a reasonable basis for the Chancellor's determination that there is no significant threat of future violations of the statute. Conclusion of Law No. 9 certainly sets forth an eminently reasonable basis for such a determination.

Likewise irrelevant is the fact that appellant has a duty to enforce the antitrust law. Of course it has. But it can perform that duty in the future regardless of the outcome of this case. Affirmance of the trial court will be without prejudice to future suit if any of the appellees engage in illegal practices, whether or not such practices were involved in the present action. See *United States* v. *Oregon State Medical Society*, 343 U. S. 326, 339-340 (1952).

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We respectfully submit, therefore, that the appeal presents no substantial question for the decision of this Court, and that the judgment of the trial court should be affirmed or, in the alternative, that the appeal should be dismissed.

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October 19, 1953.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1953.

No. 464

UNITED STATES OF AMERICA,
Appellant,

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THE BORDEN COMPANY, ET AL.,
Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF ILLINOIS.

BRIEF FOR THE BORDEN COMPANY, BELMONT DAIRY COMPANY, BOWMAN DAIRY COMPANY, AND RIDGEVIEW FARMS DAIRY, INC., APPELLEES.

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UNITED STATES OF AMERICA,

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RIEF FOR THE BORDEN COMPANY, BELMONT DAIRY COMPANY, BOWMAN DAIRY COMPANY, AND RIDGEVIEW FARMS DAIRY, INC., APPELLEES.

OPINION BELOW.

The district court's memorandum and order dismissing ıe complaint (R. 80-113) is reported at 111 F. Supp. 562. he opinion and order limiting the issues and the proof R. 48-52), and the findings of fact, conclusions of law, ıd judgment (R. 113-125) are not reported.

JURISDICTION.

On March 30, 1953, the district court entered an order dismissing the complaint (R. 112). On June 17, 1953, the district court entered its findings of fact, conclusions of law and judgment (R. 113-125). On August 6, 1953, the Government's motion for a new trial was denied (R. 151-152). The appeal was allowed on October 2, 1953 (R. 431). The jurisdiction of this Court was invoked under Section 2 of the Expediting Act, 32 Stat. 823, 15 U. S. C. 29, as amended, 62 Stat. 869; the Court noted probable jurisdiction on December 14, 1953 (R. 443).

QUESTIONS PRESENTED.

1. Whether the district court made three errors in rulings on evidentiary matters, and if so, whether these rulings substantially affected the outcome of the trial.

2. Whether the district court abused its discretion in holding that upon the facts and the law the Government had not established a right to injunctive relief against future or recurrent violations of the Clayton Act.

STATEMENT.[1]

On September 16, 1940, defendants Bowman, Borden and certain other dairies consented with the Government to the entry of a decree by the District Court for the Northern District of Illinois enjoining certain alleged violations of the Sherman Act in *United States* v. *Borden, et al.*, No. 2088 (R. 48-51, 114).

On June 18, 1951, the Government filed the instant ac-

1. All references herein to the Government's brief will be identified by "Br." All references to the Appendix attached hereto will be identified by "App." All emphasis hereinafter appearing has been added unless otherwise specifically noted.

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tion against ten defendant dairies (R. 23). The complaint alleged that since "about 1940" the defendants had been engaged in a conspiracy to restrain and monopolize the sale of fluid milk to wholesale customers in the Chicago area in violation of Sections 1 and 2 of the Sherman Act (R. 30), and that since "January, 1941" each of the defendants had been selling fluid milk to wholesale purchasers in the Chicago area at discriminatory prices in violation of the Clayton Act (R. 37).

During July, 1951, the Government served interrogatories on defendants (R. 4). During September, 1951, the Government took the depositions of Messrs. Bello, Bishop and Heinz (R. 4-5). This was the extent of the Government's pretrial discovery.

On the Government's motion, the district court conducted pretrial conferences beginning on February 12, 1953, and continuing daily thereafter until March 4, 1953 (R. 116). Coincidental with the pretrial conference five of the defendants and the Government reached agreement upon the terms of a consent decree. This decree was entered on February 19, 1953 over the objections of the remaining defendants. The consenting defendants did not thereafter participate in the pretrial conferences or in the trial (R. 116).

During the course of the pretrial conference on February 27, 1953, the court entered an opinion and order limiting the issues and the proof (R. 48-52). The trial court stated that it was attempting to follow the procedures recommended by the Committee of the Judicial Conference of the United States of which Judge Prettyman was chairman,[2] with respect to antitrust cases of the magnitude and complexity of the present case (R. 48-49). With certain exceptions, the court ordered that proof be limited

2. The report of the Committee may be found at 13 F. R. D. 62.

to the period after September 16, 1940, the date of the consent decree entered in a prior case mentioned above (R. 51). This order is not attacked by the Government on this appeal.

The trial began March 4, 1953 (R. 116). At the opening session the defendants obtained permission to make general objections to all testimony, in order to condense the argument as much as possible (R. 153-154). In the main, these were objections to testimony and documents relating to one defendant being received as against another defendant on the ground that until the alleged conspiracy had been proved such evidence was hearsay as to the objecting defendant (R. 153-154). With respect to these objections, the court said:

> "Now, the situation here is this. We have no jury here, and it is my thought that insofar as any materiality is shown at all, that I would allow evidence to go in and rule on any objections that may be made as the evidence is offered, and I would also let the evidence in general be subject to these general objections, which I would herein now overrule.
>
> "I do that, however, with the reservation that in the briefs at the end of all the evidence, if it appears that data is not connected up, certain evidence is not connected up, or if it appears from the final testimony that some of it is purely hearsay, that that may still be argued by the parties in their briefs, and in that way we will save considerable time in getting the evidence in before the Court as quickly as possible, and I think that will work to the advantage of the Government as well as the defendants" (R. 155).

From March 4 to March 23 the Government presented its case (R. 116). During the fourteen trial days the Government offered over 1,500 exhibits, of which over 1,000 were received in evidence, and called over 65 witnesses (R. 9-18). During the course of the trial the court was called upon to make hundreds of rulings on evidence.

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After the Government rested, each defendant moved for dismissal pursuant to Rule 41(b) of the Federal Rules of Civil Procedure on the ground that the Government had shown no right to relief (R. 66-79). In opposing these motions, the Government contended that the court was precluded from weighing the evidence, and merely had the duty of determining whether or not the evidence considered in a light most favorable to the Government made out a *prima facie* case (R. 83-84). The district court rejected this contention, and concluded that, as trier of fact, it was under an affirmative duty to review and weigh all the evidence presented by plaintiff, and, upon the basis of that review, to determine whether or not the evidence warranted the relief sought in the complaint (R. 84, 123). The Government does not challenge this interpretation of Rule 41 (b).

After extensive argument and after weighing all of the evidence in the voluminous record, the court found that the Government's evidence failed to establish the existence of a conspiracy (Fdgs. 26, 32, 33, 34; R. 120-121). None of the findings of fact or conclusions of law is attacked by the Government (Br. 8).

On March 30, 1953, the trial court delivered a lengthy opinion reviewing the issues and the evidence (R. 80-113). This opinion reviews all of the evidence in the record which tends even in the remotest manner to prove the allegations of the complaint. The trial court expressly stated that it had "deliberately reviewed the record in a manner most favorable to the Government," but it found the Government's case "utterly lacking in substance" (R. 111).

Judge Campbell throughout the trial permitted the Government great latitude in presenting its evidence, and allowed much evidence of questionable competence to be admitted subject to final argument. Nevertheless he expressed his total impression of the Government's case as follows:

"I am convinced that this suit insofar as it charges Sherman Act violations should not have been filed. The Government began its investigation of this phase of the milk industry in Chicago in 1947, and has had six years to gather evidence in support of the charges in its complaint; yet this court now holds, as it must, that such evidence has not been gathered. I have deliberately reviewed the record in a manner most favorable to the Government, and have found its case to be utterly lacking in substance. The Government thought it necessary to subpoena counsel for the Dean Milk Company at an early stage of this trial, and sought the production of material he had prepared for the Dean litigation. This court then had to balance an attorney's right to the privacy of his work product against the right of the Government to amass evidence for trial. This was an unpleasant dispute, and a dispute which should not have been presented to this court. It is also apparent that a portion of the Government's evidence was scraped together during the trial. Many of the Government's witnesses were contacted and interviewed after the trial had begun, and some of them offered no relevant testimony whatever during examination. These factors leave little room for doubt, at least in the mind of the court, as to the quantum of evidence in the hands of the Government at the time this complaint was filed" (R. 111).

The section of the Government's brief entitled "The Government's Evidence" (Br. 8) contains selected excerpts and partial quotations of the trial court's extensive review of the evidence, which review included all of the isolated pieces of evidence most strongly supporting the Government's allegations. Since the findings are not in issue, and since only a small portion of the entire trial record is before this Court, it is manifestly inappropriate to attempt to burden this Court with a description of all the details of the evidence; and we shall not lengthen this statement by an analysis of the many items which contradict, dis-

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prove or explain the various selected excerpts identified in the Government's brief. The discussion which follows is confined to a description of the facts which will enable this Court to understand the trial setting of the rulings which are challenged on this appeal.

I.

The Three Evidentiary Rulings Attacked by the Government.

A. The Eggleston Deposition.

H. C. Eggleston was employed by Bowman for approximately thirty-five years (R. 170, 171). He was promoted from sales supervisor to Sales Manager prior to February 25, 1941 (R. 171, 172, 184, 257, 259, 332, 336). He left Bowman's employ on June 1, 1943 (R. 171, 172, 269).

Shortly thereafter, he obtained the Chicago franchise for the Dr. Pepper Bottling Company (R. 334). In January, 1951 a Government attorney questioned him about the soft-drink bottling industry (R. 329, 333). A possible civil action by the Chicago Dr. Pepper Bottling Company against the Coca Cola Company for alleged violations of the antitrust laws was discussed (R. 329, 334).

On January 25, 1951 Thomas McConnell, a Chicago lawyer, filed a treble damage suit against the Coca Cola Company on behalf of the Chicago Dr. Pepper Bottling Company (R. 328).

On January 29, 1951 Eggleston signed a nine-page affidavit prepared by McConnell for use in *Dean Milk Co.* v. *American Processing and Sales Co.*, N. D. Ill. E. D., No. 49-C-1159[3] (R. 158, 341), in which McConnell was attorney

3. The complaint in that case alleges that Bowman and Borden, among others, were engaged in a conspiracy in violation of Sections 1 and 2 of the Sherman Act and were violating Section 2 (a) of the Clayton Act. It sought damages and equitable relief. Beloit was not a party to that case.

for the plaintiff (R. 134). This affidavit was subpoen
by the Government in the instant case (R. 158, 170), mar
as Exhibit 45 for identification (R. 198) and used ex
sively in an effort to impeach Eggleston's trial testim
(R. 198, 205, 209, 217, 219, 220, 336, 337, 340). It was
scribed by McConnell as a statement of what Eggles
was to testify to in the *Dean* case (R. 169).

McConnell took Eggleston's deposition in the *Dean* c
on March 23, 1951 (R. 158), during which McConnell
terrogated Eggleston about copies of numerous minute
meetings held by the Sales Committee of Bowman wh
were in Eggleston's possession (R. 183, 184). They w
all turned over to the Government in the instant case p
suant to subpoena (R. 158, 170). Many were offered
the Government and received in evidence (R. 96-102); t
were used extensively in the examination of Eggles
(R. 180-182, 187, 190-192, 225, 228, 229, 235, 237, 241,
252, 253, 257-262, 264, 265, 267, 268, 276, 279, 305, 308,
314, 316).

Eggleston was on the witness stand for three t
days (R. 170, 204, 227, 270, 304). His testimony c
prises about half of the printed record on this appeal
170-345). Judge Campbell appraised Eggleston as "o
all, a truthful witness" (R. 95).

The fifty-odd depositions taken by plaintiff in the *D*
case, including the Eggleston deposition, were filed w
the clerk of the district court under seal. On Decembe
1952 a decree was entered in the *Dean* case pursuant
the terms of a stipulation between the parties (R. 122).
January 23, 1953, on the application of a Government
torney, Judge Igoe, presiding in the *Dean* case, ente
an *ex parte* order granting leave to the Government
torney to withdraw for five days the depositions of fo
teen witnesses in the *Dean* case, including the Eggles
deposition (R. 133). None of the parties to the *Dean* c

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received notice of the application for this order or of its entry.

On January 28, 1953, after notice, a Government attorney filed a motion in the *Dean* case for an order authorizing the clerk of court to unseal and open all of the depositions which were sealed and on file in that case (App. 59). After a full hearing on February 10, 1953, Judge Igoe entered an order denying the Government access to these depositions. After explaining that his ruling[4] was, in part, based on the fact that the parties had reason to believe that "the matters revealed in those depositions were protected under the seal of this Court," Judge Igoe stated:

> "I will say this. If Judge Compbell wants the depositions, all he has to do is send an appropriate order down here, and we will recognize it, and he can take the depositions up there and rule on it as he sees fit" (R. 161).

The Government at no time prior to the commencement of the trial and at no time during the extensive pretrial conference, made any application to Judge Campbell for an order requesting access to the depositions.

The matter was first presented to Judge Campbell on March 5, 1953, when McConnell responded to a subpoena

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4. "I don't think that it is at all unreasonable to say that at the time the decree was consented to by the defendants, they must have had in mind that the secrecy surrounding these depositions would be protected, and the seal under which they were sealed in this Courthouse would not be violated.

"Now that decree has been entered, as I say, and the judgment has also been entered. The matters have been concluded. To me it seems kind of unreasonable to say that after all that has been gone through, when and after, no doubt, the defendants have considered *that the matters revealed in those depositions were protected under the seal of this Court*, that after all that has been concluded, then some outsider might come in here and say, Well, we want that seal broken, and we want revealed everything that is contained in those depositions.

"That is the sort of procedure that does not appeal to me • • •" (R. 160-161).

duces tecum commanding him to produce either the original or a copy of the Eggleston deposition (R. 158). McConnell produced his office copy (R. 159). The defendants objected to its production on the ground that Judge Igoe had previously ruled that the deposition was protected under seal (R. 158-159). In an extended argument, the Government asserted that it had a right to obtain a copy of the deposition, even though the original was sealed, because "the sovereign state of the United States has a right to procure its evidence wherever it can" (R. 162). Judge Campbell sustained the defendants' objections (R. 163). The Government does not now challenge the propriety of either Judge Igoe's ruling, or of this ruling by Judge Campbell.

Subsequent to this ruling by Judge Campbell, McConnell conferred with his client, the Dean Milk Company, and with counsel for the Government and decided that he would cause the Eggleston deposition to be physically opened[5] (R. 189).

On March 5, 1953 a Government attorney obtained from the clerk of court twelve *Dean* case depositions, including Eggleston's (R. 132), by using the *ex parte* order entered by Judge Igoe on January 23, 1953, even though it had been superseded by the contrary ruling on February 10, 1953 (R. 129).

On the following day, while Eggleston was on the witness stand, Government counsel informed the court that he was in possession of the Eggleston deposition (R. 185). When the defendants objected to his possession, Judge

5. Rule 14 of the Rules of Court for the Northern District of Illinois provides as follows: "*Unless otherwise ordered by this court*, the clerk shall, upon request of a party or his attorney, open any deposition filed in this court, first endorsing on the back thereof at the time of opening the name of the party or attorney at whose instance the deposition is opened."

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Campbell stated "as far as it being in his possession, I don't propose to go into it. Insofar as he is going to use it in asking any questions here, I certainly am going into it. Thus far there is nothing before me. Apparently, there are various ways of getting many things around here" (R. 185).

Thereafter, Government counsel offered to prove that McConnell had directed that the Eggleston deposition be opened (R. 189). The court then stated "I then take it that McConnell and his client the Dean Milk Company, have overruled this court and Judge Igoe" (R. 189). He further commented that he thought "the matter should be referred to Judge Igoe for whatever action he cares to take in the nature of a complaint for contempt" and refused to hear further argument (R. 189).

On March 9, 1953, while the Government was still presenting its evidence, defendants, upon notice both to Government counsel and to the other parties in the *Dean* case, moved before Judge Igoe that the deposition be resealed (App. 62). Thereupon Government counsel filed a motion in the *Dean* case asking that the motion to reseal be continued until after the trial in the present case was concluded (App. 62). The motion to reseal was thereupon continued until April 10, 1953, after termination of the trial below. It was then granted as to all the depositions except Eggleston's, which was withheld pending an investigation by the Department of Justice (R. 137-8).

A written offer of proof, based upon isolated passages taken from the deposition, was filed with Judge Campbell and denied before the conclusion of the Government's case (R. 52-64). Judge Igoe's refusal to reseal the Eggleston deposition, the Government's offer of proof with respect to the Eggleston deposition, and the contentions of the Government with respect to the entire matter were pre-

sented to Judge Campbell at the time of the Government's motion for a new trial (R. 129-149). The motion for a new trial was denied (R. 151, 152).

As is pointed out at pages 25 through 28, *infra*, the Government's offer of proof does not in fact impeach Eggleston's testimony with respect to any one of the six so-called "principal conflicts" asserted and relied on by the Government.

B. The Newey Tape Recordings.

McConnell, counsel for Dean Milk Company in the *Dean* case, employed Paul Newey to assist him in that litigation[6] (R. 168, 371). Newey, posing as "Paul Mutzi", and pretending to be the owner of a grocery store, telephoned various dairies and suggested that he might wish to change milk suppliers (R. 371-373, 400). When dairy salesmen called on him, he led them into conversations which he recorded through a concealed microphone (R. 373). These tape recordings were later transcribed (R. 405). He did not have conversations with salesmen from Bowman, Beloit, Belmont, or Ridgeview, but testified that he had one with a Borden salesman (R. 382), whom he failed to identify in court (R. 409).

Judge Igoe, on April 25, 1952, denied motions of the *Dean* case defendants for production of these recordings, holding them to be the work product of McConnell (R. 165-168). McConnell asserted the same right in the present case when the Government sought to subpoena the recordings and transcripts from him (R. 164-167). When the Government stated that it only wanted them to substantiate

6. Newey was a lawyer who had brought an antitrust case against Bowman and Beloit. Before filing that suit, Newey had consulted McConnell as the result of a conversation with an attorney in the local antitrust division of the Department of Justice (R. 401-403).

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Newey, who was being called as a friendly witness (R. 167), Judge Campbell sustained McConnell's objection (R. 169). The Government complains of this ruling.

Later McConnell wrote Newey that he was turning over the transcripts and tapes to Newey to refresh the latter's recollection, and added that "if the Court sees fit to require you to do so you may submit the tape recordings and the transcripts thereof to the defendants in the case as well as to the Government for their use in the case" (R. 148-149). Government counsel thereupon (the day before Newey testified) requested permission to set up the necessary sound equipment in the courtroom to play the recordings (R. 368), and showed the court McConnell's letter to Newey (R. 369).

Judge Campbell interpreted the letter merely as an authorization to Newey to use the material to refresh his recollection (R. 369). The Government did not object to this interpretation, nor produce McConnell to show a different meaning (R. 369). The court then stated that "the ruling made at the time Mr. McConnell asked for it still stands" (R. 369).

The record shows that, during the course of the trial, the tapes and transcripts were voluntarily turned over to Government counsel (R. 144). At no time—even when Newey's inability to remember his conversations was obvious—did the Government offer in evidence the tape recordings or the transcripts, or make an offer of proof as to what they would show.

C. The Conversation Between Moser and a Deceased Borden Agent.

The third ruling of the court attacked by the Government relates to the testimony of Hans Moser, vice president of a non-defendant dairy (R. 104, 351-352). Moser was asked to repeat a 1943 conversation he had with Baril, a deceased agent of Borden (R. 351). The court sustained an objection to the question (R. 352). The Government then offered to prove: that in July, 1943, Moser bid for and received the milk business of Navy Pier, Chicago; that in a conversation Baril referred to the Navy Pier as Borden business and asked why Moser had bid on it; that Moser explained that he had to show some Government business in order to get a wartime priority on machinery; that Baril replied that Borden would have to get some of Moser's store accounts to offset the business it lost; and that Moser never again bid at Navy Pier and did not lose any store accounts to Borden (R. 65).

II.

The Ruling on the Clayton Act Issues.

The complaint alleged that since January, 1941, each defendant had been selling fluid milk to wholesale purchasers in the Chicago area at discriminatory prices in violation of Section 2(a) of the Clayton Act (R. 37-38). It expressly alleged that the defendants "will continue the aforesaid offenses unless the relief hereinafter prayed for is granted" (R. 38).

The trial court stated that Bowman and Borden each had, in past years, in some instances discriminated among its purchasers, although the evidence relative to such discriminations was conflicting, and there was much material

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in the record showing that affirmative defenses were available (R. 108).[7]

However, the trial court found, that insofar as the Clayton Act was concerned, Bowman, Borden, Ridgeview and Belmont were already effectively enjoined from performing any of the acts set forth in the Government's prayer for injunctive relief (R. 123). Section VII of the decree entered by Judge Igoe of the same court on December 3, 1952 in the *Dean* case expressly prohibited Bowman and Borden and their subsidiaries, Ridgeview and Belmont, from engaging in any of the discriminatory practices shown by the evidence (R. 109-111). Accordingly, the court concluded that "since the violations of the Clayton Act described in the complaint and shown at the trial are, for the most part, old violations, and since the *Dean* decree assures that there will be no new violations, this court shall not grant the injunctive relief sought by plaintiff under Section 2(a) of the Clayton Act" (R. 125).

In his memorandum and order, Judge Campbell stated:

> "As a court of equity, I will not perform a useless task. The violations of the Clayton Act described in the complaint and shown at the trial are, for the most part, old violations. And to this court, the *Dean* decree assures, as completely as any decree can assure, that there will be no new violations." (R. 111.)

The record contains no evidence of any violation of the Clayton Act by any of the appellees either since the entry of the *Dean* decree on December 3, 1952, or during a period of several years preceding the entry of that decree.

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7. The court expressly found that there was no evidence of any violation by Beloit.

SUMMARY OF ARGUMENT.

I.

Each of the three challenged evidentiary rulings was proper. Moreover, they did not affect the outcome of the litigation.

A. The limitations imposed by the trial court on the latitude to be allowed Government counsel in attempting to impeach its own witness were clearly proper and did not prejudice the Government's presentation in the slightest. In ruling on the Government's motion for a new trial, the trier of fact had before it all of the facts and arguments presented to this Court in addition to its intimate knowledge of the entire trial record and determined at that time that no useful purpose would be served by reopening the proofs. Eggleston's deposition does not in fact impeach his trial testimony; even if that testimony were deleted from the record, the Government's affirmative case would still be "utterly lacking in substance."

B. With respect to Newey, the Government merely attacks a ruling (and also the refusal to change that ruling) which denied the Government power to compel McConnell to surrender physical possession of certain tapes and transcripts. Subsequent to the court's ruling the tapes and transcripts were voluntarily turned over to the Government. Accordingly, the court's ruling had no effect whatever on the Government's opportunity to present its case. Despite the fact that the Government acquired possession of the material which the trial court refused to subpoena, neither the tapes nor the transcripts were offered in evidence, and no offer of proof was made with respect to any of this material. Furthermore, the court was correct in sustaining McConnell's objection to surrendering the tapes and transcripts, and the record conclusively shows

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that this evidence would have had little or no probative value.

C. It was not error for the trial court to exclude testimony describing an ambiguous and irrelevant conversation between a deceased employee of a defendant and an executive of a non-defendant occurring more than a decade before the witness took the stand since it is well settled under the applicable Illinois authorities that such testimony is entitled to little or no probative value and is, in the circumstances of this case, plainly immaterial.

II.

The record does not establish that the Government is entitled to any equitable relief against recurrent violations of Section 2(a) of the Clayton Act. The evidence of violations of that statute in past years was plainly insufficient to require the chancellor to exercise his discretion to grant injunctive relief. This is particularly plain since the trial court expressly found that the defendants were already effectively enjoined from performing any of the acts described in the Clayton Act portions of the Government complaint.

ARGUMENT.

I.

THE DISTRICT COURT'S RULINGS ON EVIDENCE WERE ENTIRELY PROPER AND DID NOT SUBSTANTIALLY AFFECT THE RIGHTS OF THE PARTIES.

Before demonstrating that each of the three challenged evidentiary rulings was clearly correct, we shall comment briefly on all three rulings.

Despite the fact that the pretrial conference took three weeks and the trial an equal length of time, despite the fact that the Government had been preparing its case for at least six years, despite the fact that the Government called 65 witnesses and offered over 1,500 exhibits (most of them obtained from the files of the defendants), the Government failed to prove its case.

Despite the fact that the trial court permitted the introduction of evidence which was never tied up to the charges made, despite the fact that the bulk of the rulings were favorable to the Government, the Government now asserts that it was prejudiced because of three among the hundreds of rulings on evidence made in the course of trial.

Despite the fact that it had the aid of grand jury subpoenas and grand jury evidence, despite the fact that it had the services of the Federal Bureau of Investigation, despite the fact that it had years in which to take the depositions of witnesses, the Government complains primarily because it was not permitted to supply deficiencies in its own evidence by using depositions and tape recordings, admissible only for limited purposes at best, and obtained by an attorney in private practice in the course of private litigation.

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The trial judge's rulings on *evidentiary* matters and on questions as to which he has discretion should be appraised on appeal in the perspective of the whole record. Even if error on such matters be committed, the judgment should not be reversed unless the appellant demonstrates that its "substantial rights" have been affected.[8] As a consequence it is not necessary for the trial judge to state all of the reasons, or indeed any reason whatever for a ruling on evidence if in fact that ruling is proper.[9]

In its effort to demonstrate that the three challenged evidentiary rulings had a substantial effect on the outcome of the litigation, the Government has asked this Court to view the effect of the three rulings "collectively" (Br. 32). This request is a recognition of the plain fact that none of the three rulings in itself conceivably constitutes reversible error. Thus the Government has, in effect, acknowledged that the judgment must be affirmed unless all three of the rulings were in cumulative effect a denial of substantial rights to the Government.

When the three rulings are considered in connection with the numerous other rulings on evidence made during

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8. 28 U. S. C. Sec. 2111 reads as follows: "On the hearing of any appeal or writ of certiorari in any case, the court shall give judgment after an examination of the record without regard to errors or defects which do not affect the substantial rights of the parties."

Rule 61 of the Federal Rules of Civil Procedure reads as follows: "Harmless Error. No error in either the admission or the exclusion of evidence and no error or defect in any ruling or order or in anything done or omitted by the court or by any of the parties is ground for granting a new trial or for setting aside a verdict or for vacating, modifying, or otherwise disturbing a judgment or order, unless refusal to take such action appears to the court inconsistent with substantial justice. The court at every stage of the proceeding must disregard any error or defect in the proceeding which does not affect the substantial rights of the parties."

9. *Helvering* v. *Gowran*, 302 U. S. 238, 245 (1937); *Silsby et al.* v. *Foote*, 14 How. 218 (1852); *Navajo Freight Lines* v. *Mahaffy*, 174 F. 2d 305 (10th Cir. 1949).

the course of the trial, we firmly believe that the trial court erred on the side of the Government in receiving a substantial volume of technically inadmissible evidence.[10] The court justified the reception of such evidence on the ground that the case was being tried without a jury, and many arguments which would normally go to admissibility could be directed at the weight of the evidence.[11]

The defendants could not successfully contend that this procedure, in a trial without a jury, substantially affected their rights. It is equally plain that the evidentiary rulings challenged by the Government had no actual effect on the outcome of the case—particularly since the trier of fact had full opportunity to study the Government's offers of proof.

The three rulings which are challenged will be discussed in the order presented by the Government.

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10. Early in the trial the judge stated: "We have no jury here, and it is my thought that insofar as any materiality is shown at all, that I would allow evidence to go in * * *" (R. 155). This attitude was maintained throughout the trial.

11. For example, the court could properly have sustained the objection to Heinz' testimony describing a statement supposedly made by Eggleston in 1945 (R. 366). This testimony was plainly objectionable as hearsay and not an admission of an adverse party since Eggleston had not been an employee of Bowman since 1943 (R. 171-172). Nevertheless, the court admitted the evidence with the comment that counsel could argue against its weight later (R. 366).

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A. It Was Not Error for the District Court to Limit the Government's Opportunity to Attempt to Impeach the Witness Eggleston by Refusing Counsel Permission to Use a Copy of a Deposition Which Had Been Filed Under Seal in Another Proceeding.

Prior to the trial Eggleston testified before the grand jury on two separate occasions (R. 162). He was also interviewed by three Government attorneys several different times (R. 162, 177, 179, 270, 271, 333, 334). He had signed a nine-page affidavit prepared by McConnell covering the testimony he was expected to give in the *Dean* case (R. 158, 169, 170), and this was placed in the hands of the Government (R. 158, 169, 170). He had taken with him when he left Bowman a large number of sales committee minutes which were also put in the hands of the Government (R. 157, 158, 170). The Government did not take Eggleston's deposition (R. 162). It made no use of his grand jury testimony, although the grand jury transcript was available to the Government; none of the Government attorneys who had interviewed Eggleston was called as a witness, even though Eggleston characterized one of their statements as "an absolute falsehood" (R. 274).

Despite all this, Government counsel now assert that they lost their case because they were not able to use Eggleston's *Dean* case deposition for additional impeachment of this witness.

There are six essential links in the Government's argument that the district court committed prejudicial error in refusing to permit use of the Eggleston *Dean* case deposition for impeachment purposes. If any one of the links in the chain is broken, the Government's argument must fail.

Ultimately, the Government must satisfy the Court that the trial court committed error which affected the sub-

stantial rights of the parties. The Government must sho
a substantial probability that the trial court would hav
reached a different conclusion on the merits, if it had pe
mitted the Eggleston deposition to be used at the trial.

In its attempt to persuade this Court to reach that ul
mate conclusion, the Government has been forced to re
ognize that the mere failure to impeach its own witness
not enough. Therefore the Government is compelled
assert that by its failure to impeach Eggleston, it was d
prived of the full benefit of the testimony of another wi
ness, Heinz. Thus the Government must argue as follows

First, that if the trial court had believed the witne
Heinz, it would not have dismissed the complaint on th
merits;

Second, that the trial court would not have discounte
the testimony of the witness Heinz if it had not found tha
Eggleston was "over all, a truthful witness";

Third, that the trial court would not have considere
Eggleston as, on the whole, a truthful witness, if the Gov
ernment had been permitted to attempt to impeach hi
with his prior deposition;

Fourth, that without use of the Eggleston deposition i
was impossible for Government counsel to cross-examin
Eggleston effectively;

Fifth, that it was error for the trial court to hold o
March 6, 1953, that the deposition was not available to th
Government on the ground that it was protected by th
seal of court;

Sixth, that there are no alternative grounds to sup
port the trial court's ruling.

We shall demonstrate that the Government's position i
untenable with respect to every one of these six essentia
links in its argument.

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1. The Testimony of the Witness Heinz Certainly Was Not Vital Evidence.

After summarizing the Heinz testimony in his opinion, Judge Campbell concluded:

> "It should be noted also that here, again, the Government offers evidence of alleged meetings which took place over twelve years ago between two of ten alleged conspirators" (R. 95).

Plainly, even if he had accepted the Heinz testimony at face value, Judge Campbell would not have reached a different conclusion on the merits.[12]

2. The Trial Court Had Several Adequate Reasons for Discounting the Testimony of the Witness Heinz, Entirely Apart from the Testimony of Eggleston.

Since the deposition of Eggleston was offered solely for impeachment purposes,[13] and obviously could not in consequence have been used as affirmative evidence,[14] the most that the Government could possibly have achieved by the use of the deposition would have been to persuade the

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12. Heinz testified to certain meetings with an employee of Borden and also that Eggleston told him that "they were getting their fair share of the business" at Great Lakes (R. 362), and that Great Lakes and Fort Sheridan were being "shared on an alternate basis with Borden Dairy Company" in 1942 (R. 361). Heinz did not testify that Eggleston said (as the Government implies) that Bowman was getting an allocated share of this business because of an agreement with Borden. Ambiguous evidence, even if distorted, hardly justifies a finding of conspiracy.

13. The Government offer of proof concludes as follows: "That if after hearing said questions and answers read, the witness H. C. Eggleston denies having made them, the Government will claim the witness' oral testimony given in this cause wherever contrary to the testimony in said deposition, has been and is impeached." (R. 64.)

14. *United States* v. *Socony-Vacuum Oil Co.*, 310 U. S. 150, 234 (1940); *Southern Ry.* v. *Gray*, 241 U. S. 333, 337 (1916).

trial court to disregard Eggleston entirely. Even if it be assumed for the sake of argument that Eggleston should be ignored completely, it is still clear that the Heinz testimony was not credible.

Judge Campbell expressly identified three independent reasons for discounting Heinz. He pointed out that he had been unable to view Heinz on the witness stand, and also that there was nothing in the record to corroborate his testimony (R. 95). During the reading of the deposition the court also noted that Heinz' testimony about a conversation with Eggleston two years after he had left the company was an inaccuracy going to the weight of his testimony (R. 366).

Judge Campbell was doubtless aware of many other discrepancies in Heinz' testimony. For example, Heinz said that his conversation with Eggleston about the Great Lakes business—about which the Government argues at length—took place in 1942; but he also stated that Eggleston then was a sales supervisor. The documentary evidence discloses that this must have been taken place prior to February 25, 1941.[15] In view of the crucial importance of the 1940 cut-off date, Heinz' repeated uncertainty as to the time of the conversations about which he testified affords an added reason for discounting his testimony.[16]

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15. Eggleston had been promoted to Sales Manager prior to the date of the earliest Sales Committee Meeting Minute found in the record (R. 172, 184). The earliest minute introduced by the Government was dated March 18, 1941 (R. 257), and a minute dated February 25, 1941 was marked as defendant's exhibit 1 for identification (R. 332). Moreover, Heinz was not confused as to Eggleston's title because he described the differences between the duties of a sales supervisor, who was an immediate superior to a branch manager, and the duties of the Sales Manager who had general supervision of fluid milk sales (R. 363).

16. Consider, for example, the following interrogation of Heinz by Government counsel:

"Q. Can you tell us something of the date of that conversation with respect to the date of the document?

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3. The Deposition Would Not Have Impeached Eggleston's Trial Testimony.

We assume that Government counsel, in preparing their offer of proof, selected from the extensive deposition given by Eggleston in the *Dean* case all of the points of supposed discrepancy with his trial testimony. We assume also, that Government counsel, in selecting six of these supposed inconsistencies for argument (Br. 18-20), picked the ones most favorable to their argument.

The pertinent principles of law are so well settled as to require little discussion. Of course, "impeachment by contradictory statements must be upon a material matter," *American Ins. Union* v. *Lowry*, 62 F. 2d 209, 212 (5th Cir. 1932), *cert. den.* 298 U. S. 745; *cf. People* v. *Pfanschmidt*, 262 Ill. 411 (1914); *Prather* v. *Chicago Southern R. R. Co.*, 221 Ill. 190 (1906); the statements must be clearly inconsistent, *Clemens* v. *Kaiser*, 211 Ill. 460, 467 (1904); and the scope of attempted impeachment may be limited in the discretion of the trial court.

> "These assaults and counter assaults upon the witnesses and parties concerning matters which are material only as affecting their credibility must end somewhere, and the court did not abuse its discretion in refusing to open the door any wider. Indeed, if we were to hold that the court erred in this ruling, we should not regard the error of a character to require a reversal of the case." *Dugger* v. *Kelly*, 168 Iowa 129, 139 (1914).

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16. *Continued*—

A. It would be prior to this time.
Q. Prior to August 3?
A. Yes.
Q. 1942?
A. Yes, sir.
Q. About how long prior?
A. I couldn't say, sir" (R. 361).

Furthermore, the trier of the facts cannot disregard the testimony of a witness shown to have made inconsistent statements at another time unless he believes that the witness has *wilfully* sworn falsely in testifying to a material matter.

> "Where a witness is contradicted as to a material matter, or evidence is offered showing that he has made statements at another time inconsistent with his testimony as to a material matter, he is not thereby impeached, according to the more restricted significance of the word, unless the jury believe from the contradiction, or from the proof of inconsistent statements made at another time, that he has *wilfully* sworn falsely as to the material matter * * * to which it is charged he has made inconsistent statements at another time." *Chicago City Ry. Co.* v. *Ryan*, 225 Ill. 287, 289-290 (1907).

Minor inconsistencies, such as a shift of emphasis or a natural difference in recollection at different times, do not constitute impeachment.

The fallacies in the Government's repeated assertions that Eggleston's deposition impeached his trial testimony can be easily demonstrated by considering the six so-called "principal conflicts" in the order listed in the Government's brief.

(a) The Government states that Eggleston testified that Bowman did "very little" "stop buying" prior to June of 1943 (Br. 18). The Government explains that "stop buying" is the practice of "offering of cash and other gratuities to induce stores to *change* suppliers" (Br. 18). This is said to be inconsistent with testimony at the deposition that "stop buying" payments were "running maybe 100,000, 150,000 a year" at that time. In fact, however, this deposition testimony does not refer to "stop buying"—indeed, does not even mention "stop buying"—but on the contrary relates to discounts and allowances to "grocery

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tore people" pursuant to "instructions not to *lose* any business to the Dean Milk Company" (R. 54).

(b) Eggleston testified that he "had nothing to do with he financial statements" and hence did not know whether Ridgeview "operated at a loss" (R. 200). On his deposition, he expressed the opinion that Ridgeview was "not operated at a profit" while he was with Bowman and that "if anybody" absorbed the loss, Bowman did (R. 57). To express such an opinion on a deposition does not contradict a salesman's cautious statement on the witness stand that he did not really "know" the answer to a purely financial question.

(c) Eggleston's repeated denials at the trial of any agreement with Borden to share the Great Lakes business after 1940, although "prior to 1940 it was something else" (R. 180), are obviously not impeached by his deposition response to the question whether he had "ever" had any such agreement (R. 61). Indeed, the trial court would not have permitted Government counsel even to ask this question since it was not limited to the period between 1940 and 1943. Counsel were consistently required to limit questions of this nature to the period after the cut-off date.[17]

(d) Similarly, the trial testimony that Eggleston had nothing to do with school bids after 1940, although he did "way back before 1940" (R. 336) is certainly not impeached by his deposition answers to general questions not limited as to time or place. Indeed, counsel again would not have been permitted to ask the witness such questions even if the deposition had been available.

(e) The fifth alleged inconsistency starts with Eggleston's trial testimony that "at no time did *we* go below their prices" (R. 217). The Government claims (Br. 19-

17. Government counsel as well as defense counsel objected to questioning Eggleston about activities prior to September 16, 1940 (See *e.g.* R. 319).

20) that this is contradicted by his deposition statement that "*we* sold milk as low as five cents a quart off the Ridgeview trucks" (R. 59) and that Hawthorn was forced to meet this price. A reading of Eggleston's trial testimony discloses that he was using the pronoun "*we*" to refer primarily to *Bowman*, rather than to *Ridgeview*, which was under the supervision of Mr. Peck in 1940-43 (R. 217). In asserting that "at no time did *we* go below" Hawthorn prices, he probably referred to *Bowman*. On his deposition he had previously explained that "*we* had men follow" Hawthorn trucks and get the names of their customers, but added "*we* turned them over to Ridgeview" (R. 59). Thus the Government's entire argument rests on the assumption, which the context rebuts, that the pronoun "we" in all instances refers both to Bowman and to Ridgeview. Inconsistencies which are predicated on a debatable interpretation of ambiguous statements clearly are not impeaching.

(f) The sixth supposed discrepancy also disappears. There simply is no discrepancy between the trial testimony that Bowman "lost stops to Belmont" (R. 200) and the deposition testimony that Belmont bothered Bowman's accounts "once in a while" (R. 58).[18]

4. Even Without the Deposition Government Counsel Had an Adequate Opportunity to Cross-Examine Eggleston.

Eggleston appeared before the grand jury on two separate occasions, and the transcript of his grand jury testimony was available to the Government (R. 162). He was also interviewed repeatedly by various attorneys in

18. The reference in the deposition to a "general understanding" with Borden is apparently cited by the Government as *affirmative evidence* rather than as impeachment. Such use of the deposition is, of course, plainly improper particularly since at this point the deposition testimony relates to the years "1938 or 1939" (R. 54, 57).

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the Antitrust Division (R. 162, 177, 179, 270, 271, 333, 334). These attorneys were available to testify at the trial, but not one of them took the witness stand. The Government had ample opportunity to take its own deposition of the witness Eggleston, even during the period between Judge Igoe's ruling that the depositions taken in the *Dean* case were not available to the Government and the time that the trial of this case commenced.

In addition to the opportunities to impeach Eggleston which the Government had but did not use, the Government did in fact use materials which duplicated everything of importance in the deposition.

The deposition was taken by McConnell in the *Dean* case after he had prepared a nine-page statement of what Eggleston was going to testify to. This statement was signed by Eggleston, and was obtained by the Government by subpoena. This statement was used extensively by Government counsel (Exhibit 45 for identification)[19] in their unsuccessful efforts at impeachment during the three days Eggleston was on the witness stand. Substantially every detail covered by the Government's offer of proof was also covered by this affidavit.

The same may be said of the voluminous Bowman Sales Committee minutes. These were also used by McConnell as the basis for the deposition given by Eggleston in the *Dean* case and their extensive use by Government counsel at the trial afforded more than a reasonable opportunity to attempt to impeach the witness.

The court viewed the demeanor of Eggleston on the witness stand throughout this extended and intensive adverse[20] examination and concluded that he was "over all, a truthful witness".

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19. R. 198-200, 205-209, 217, 219, 220, 336, 337, 340.

20. Government counsel was permitted to examine Eggleston as an "adverse" witness, even though his right to do so was doubtful.

5. The Trial Court Properly Held on March 6, 1953, That the Eggleston Deposition Was Not Available to the Government.

Again, it is essential to evaluate the trial court's ruling in the setting in which it was made.

Before the commencement of the pretrial conferences in the instant case, Judge Igoe had entered an order in the *Dean* case denying the Government access to the Eggleston deposition. At the time he entered that order, Judge Igoe stated that if Judge Campbell personally wished to rule on the availability of the various depositions which the Government had tried to obtain, that he (Judge Igoe) would respect his ruling. Judge Campbell interpreted this comment as merely indicating "that if I want to by order personally overrule his respect of the seal in a deposition in his case, I may go ahead and do so, and he will respect that order" (R. 161). It is apparent from Judge Campbell's remarks, that he felt that Judge Igoe's order was proper, but obviously even if he had not agreed with Judge Igoe he would have been reluctant to overrule his respect of the seal.

The right of federal district courts to issue such orders with respect to depositions taken in cases before them "to protect the party or witness from annoyance, embarrassment, or oppression" is expressly conferred by Rule 30(b) of the Federal Rules of Civil Procedure.

Judge Igoe, before whom the *Dean* case was pending, had under this rule the unquestioned power to refuse to permit use of the depositions taken in the *Dean* case in other litigation. Judge Campbell, sitting in the same district, had not only the right but the duty, in comity and respect for Judge Igoe, to protect not only the letter but the apparent purpose of Judge Igoe's order. He had the power, there-

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fore, to issue further orders, applying and amplifying what he conceived Judge Igoe's order to mean.

The Government has at all times conceded that Judge Igoe's order was proper.

Judge Campbell was quite obviously offended by the technical position of Government counsel that although the original of the deposition was under seal, the seal of court did not protect the copy which was in McConnell's possession. This argument was based on the proposition that "the sovereign state of the United States has a right to procure its evidence wherever it can" (R. 162). This argument has also been abandoned by the Government.

On the following day, when Government counsel announced to Judge Campbell that McConnell had taken it upon himself to direct that the seal be broken in order to enable the Government to obtain a copy of the deposition, Judge Campbell suggested that this action was contemptuous of the order previously entered by Judge Igoe (R. 189).

The actions of Government counsel make it plain that they too realized the probability that Judge Igoe would regard this act as inconsistent with his prior order. When the defendants filed a motion to reseal the various depositions which had been obtained by the Government, Government counsel promptly moved for a continuance of the motion to reseal until after the termination of the trial below (App. 62). Thus Government counsel deliberately sought to postpone any ruling by Judge Igoe on the availability of the depositions until after the conclusion of the trial.

Furthermore, it is significant that when Government counsel filed their motion for a new trial, they attempted to justify their action in obtaining the deposition on the basis of an *ex parte* order which Judge Igoe had entered

on January 23, 1953 (R. 133) and which he had reversed, after argument, before the depositions were actually obtained (R. 160, 161).

When Government counsel were themselves anxious to avoid a prompt ruling by Judge Igoe on the question whether the deposition of Eggleston had been properly unsealed before the trial court made its ruling, the Government should not be permitted to take the position that the trial court on March 6, 1953 should have known that Judge Igoe would subsequently rule on April 16, that McConnell's action was "justified". Indeed, it is significant, that Judge Igoe did order all of the other depositions to be resealed.

Instead of doing its best to get "invited error" into the record we submit, that in view of Judge Igoe's order prior to the commencement of the pretrial conferences, Government counsel were under a duty to the trial court to explore the question of the availability of this deposition thoroughly in advance of trial.

6. The Ruling of the Trial Court Was Fully Justified on Independent Grounds.

Even if it be assumed that Judge Campbell should have known on March 6, 1953 that Judge Igoe would subsequently rule that McConnell was "justified" in directing that the deposition be unsealed, nevertheless his refusal to permit the deposition to be used for impeachment purposes was clearly proper on independent grounds. He actually relied on independent grounds when he denied the Government's motion for a new trial. He had by then been informed of Judge Igoe's ruling on the motion to reseal.

The Government had no absolute right to impeach

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Eggleston who had been called as its own witness. In prescribing the scope of examination and cross-examination, Rule 43(b)[21] permits an "unwilling or hostile witness" to be interrogated by leading questions, but extends the right to contradict and impeach one's own witness only when the witness is an "adverse party or an officer, director, or managing agent of a public or private corporation which is an adverse party." Eggleston was not employed by Bowman when testifying, and hence was not subject to impeachment under Rule 43(b).

Nor does Rule 26(d)(1) give the Government any such *right* as the Government suggests (Br. 34). That Rule applies only to the use by a party to an action of depositions taken during the pendency of that action. Eggleston's deposition was never taken by either the Government or any other party to this action and as a result does not come within the terms of Rule 26(d)(1). Whatever right the Government had to impeach Eggleston, its own witness, was based on common law principles.

Generally a party will not be allowed to impeach his own witness. However, when a party is genuinely surprised by harmful testimony, the trial court may in the sound exercise of its discretion allow the party to use prior inconsistent statements by way of impeachment.[22] Even in such cases the prior inconsistent statement can be used

21. Rule 43(b) provides: "A party may interrogate any unwilling or hostile witness by leading questions. A party may call an adverse party or an officer, director, or managing agent of a public or private corporation or of a partnership or association which is an adverse party, and interrogate him by leading questions and contradict and impeach him in all respects as if he had been called by the adverse party, and the witness thus called may be contradicted and impeached by or on behalf of the adverse party also, and may be cross-examined by the adverse party, only upon the subject matter of his examination in chief."

22. *St. Clair* v. *U. S.*, 154 U. S. 134 (1894); *DiCarlo* v. *U. S.*, 6 F. 2d 364 (2d Cir. 1925); *Young* v. *U. S.*, 97 F. 2d 200 (5th Cir. 1938); *U. S.* v. *Maggio*, 126 F. 2d 155 (3d Cir. 1942).

only to neutralize the harmful statement and cannot be used to introduce affirmative or substantive evidence.[23]

Since the question whether a party may impeach his own witness is within the trial court's discretion, it necessarily follows that the permissible latitude of such impeachment is also a matter for the trial court's discretion. Assuming that Eggleston's testimony was harmful, statements of Government counsel made before Eggleston was put on the witness stand (R. 162) plainly demonstrate that there was no element of surprise in his testimony. Thus the trial court might properly have denied the Government the right to impeach Eggleston at all. Necessarily it was within the court's discretion to limit the length of the examination for impeachment. A diligent search has failed to reveal a single case in which a trial court has been reversed for limiting the scope of impeachment of a party's own witness.

In view of the extensive examination which was permitted, particularly since Government counsel were in possession not only of the transcript of Eggleston's grand jury testimony and of memoranda of a series of interviews with various Government attorneys, but also of the Sales Committee minutes and the nine-page affidavit which formed the basis for McConnell's examination of Eggleston at his deposition, the trial court certainly had discretion to refuse to allow any more lengthy examination than it did.

Moreover, since the question whether the Eggleston deposition was available to the Government was fully argued before Judge Igoe, was never raised during the lengthy pretrial conferences, and was again fully argued on March 5, 1953, it was certainly reasonable for the trial

23. *Kuhn* v. *U. S.*, 24 F. 2d 910 (9th Cir. 1928); *U. S.* v. *Block*, 88 F. 2d 618 (2d Cir. 1937); *Ellis* v. *U. S.*, 138 F. 2d 612 (8th Cir. 1943).

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judge to refuse to interrupt the trial on March 6 for another extended argument on a question which should properly have been disposed of at an earlier date. The orderly administration of extended antitrust litigation, in accordance with the recommendations of the Judicial Conference of the United States would be substantially impaired if the trial court's eminently reasonable ruling were held by this Court to be error.

B. The Government Has Failed to Show Either Error or Prejudice With Respect to the Ruling That the Government Was Not Entitled to Obtain Possession of the Newey Tape Recordings.

McConnell, attorney for the plaintiff in the *Dean* case, responded in this case to a subpoena requesting him to produce tape recordings made by his associate, Paul Newey, and transcripts thereof (R. 164). He explained to the court that he had had a "bitter argument" with counsel for defendants when they sought in the *Dean* case "to compel me to produce in that case" these same recordings and transcripts; and that a money settlement in the *Dean* case remained unpaid (R. 165). He therefore stated, that he was opposed to having the material "now made public" (R. 165).

The trial court, after being informed by Government counsel that Newey would testify on behalf of the Government, inquired, "Then why do you need these tape recordings?" (R. 166). Counsel replied, "Because we wanted to play them for the Court so the Court could hear them" (R. 166). Later this colloquy occurred:

> "The Court: The only purpose of playing the recordings here then, Mr. Jinkinson, would be to substantiate or support the testimony of the witness Newey?
>
> Mr. Jinkinson: That's right" (R. 167).

Mr. Jinkinson added that Newey was neither adverse n unfriendly (R. 167). Thereupon the trial court pointed o that "There is no question of admissibility about the ta recordings if the testimony would otherwise be admi sible"; that McConnell's position was that he would embarrassed in the further handling of his case if these r cordings became public; and that he thought McConnell position justified (R. 168-9). Hence:

> "I do not sustain the defendants' objection, becau I don't think they are in position to object, but I su tain Mr. McConnell in his position that he is not r quired, in obedience to that subpoena, to turn the tape recordings over to the Government. It is ordered" (R. 169).

The same ruling was extended to the transcripts (R. 169 The sole effect of the court's ruling was to deny the Go ernment *possession* of the tapes and transcripts (R. 169)

Newey was saved by the Government to appear as o of its two final and climactic witnesses. The day before h appearance, Government counsel made this statement:

> "Mr. Jinkinson: Getting back to the Newey prop sition, I have subpoenaed Mr. Newey, and in order refresh his memory, I sent him over to Mr. McCo nell's office to see some tapes that he had, that M McConnell had in court here one day. Mr. Newey h the tapes in his possession.
>
> It is a question of whether or not this court is goi to hear those tapes, and if the Court is going to he them the Government, of course, would like to ha permission from the court to set up in the court roo the necessary equipment so that the tapes can played." (R. 368).

When the court inquired whether McConnell was no waiving his objection (R. 368), Mr. Jinkinson handed t court a letter from McConnell to Newey (R. 369). Th letter refers to Newey's request to use the recordings an

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transcripts "to refresh [his] recollection of the conversations with various solicitors for the above-named dairies" (R. 148). The letter proceeds to say that McConnell had discussed the matter with his client, and that "in their view and in ours, it is of the utmost importance that your credibility as a witness in relation to any of said subject matters must be preserved for the benefit of Dean Milk Company, and under the circumstances we and the company have no objection to your use of the tape recordings and the transcripts thereof for such purposes" (R. 149).

Obviously in recognition of the fact that the use in court of this material to refresh Newey's recollection would subject the witness to cross-examination based upon inspection of such material by opposing counsel, McConnell added:

> "In this regard, if the Court sees fit to require you to do so you may submit the tape recordings and the transcripts thereof to the defendants in the case as well as to the Government for their use in the case" (R. 149).

After reading the letter, Judge Campbell stated that he interpreted it as permitting use of the material solely to refresh Newey's recollection:

> "The Court: There is no use of producing the tape recordings here. If he needs it to refresh his recollection, let him refresh it before he gets on the stand. Has he already done that?
>
> Mr. Jinkinson: He is doing it now" (R. 369).

When defendants' counsel announced they would request the right to see the "documents or material" that the witness used to refresh his recollection, Mr. Jinkinson interposed: "Of course, we violently object" (R. 370). This objection is entirely inconsistent with the implication suggested by the Government's brief that there was an offer of the recordings into evidence. The court sustained Mr. Jinkinson's objection:

> " • • • Any document or other material that he uses while on the stand to refresh his recollection is subject to defense examination, and that rule, of course, I will abide by if he uses any such documents. But what he does before he comes in here to take the stand, either in conference with counsel or otherwise, is pretty largely his own business and theirs. I so rule. Is there anything else?" (R. 370).

To which Mr. Jinkinson replied: "Nothing, Your Honor, that I can think of" (R. 370). Thus, Government counsel were themselves objecting to making the transcripts or tape recordings public to defense counsel.

Newey took the stand the next day. He had with him in the court room the written transcripts of all the conversations to which he was testifying (R. 376, 410) and, on the insistence of defense counsel, one transcript was marked as Government Exhibit 1153 for identification (R. 376, 380). Prior to taking the stand, he spent four or five hours (R. 410) in the offices of the antitrust division on the fourth floor of the courthouse (R. 409), in making notes from all transcripts. He also used these notes while on the stand to refresh his recollection (R. 408). Several sets of these notes were identified as Government exhibits. He testified that he put in these notes the matters which he thought would help the Government's case (R. 410).

The Government never offered either the transcripts or the recordings in evidence, nor did the Government make any offer of proof with respect to them.

The rulings of which the Government now complains are thus limited to those made *before* Newey took the stand. By these rulings the court did nothing more than refuse to compel McConnell to surrender possession of the tapes or transcripts to the Government.

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1. The Sole Ruling by the Trial Court, Which Merely Refused to Compel McConnell to Surrender Possession of the Recordings and Transcripts, Became Moot When This Material Was Voluntarily Surrendered to Government Counsel.

Since the Government never offered the recordings or transcripts in evidence, and the trial court never "excluded" them, the sole ruling complained of is the failure to compel McConnell to produce them.

But the refusal to compel production, however interpreted, becomes an entirely academic question in light of the fact, *later* revealed, that these materials were actually placed in the hands of Government counsel, were available at trial, and subject to identification as exhibits (R. 143-145). Why ask this Court to rule that the trial court should have compelled McConnell to turn over documents which were later voluntarily turned over to the Government and made available for use at the trial?

The Government nowhere meets the issue arising from the fact that it failed to offer the material, but merely calls attention to the request of counsel "to set up in the court room the necessary equipment so that the tapes can be played" (R. 368; Br. 47). But the refusal of the court to permit the setting up of the equipment in no way prevented the subsequent *offer* of the tapes—or of the transcripts—in evidence.

Particularly is this so in view of the fact that Newey testified that the transcripts of the tape recordings contained everything which appeared in the recordings themselves (R. 405). No machine was necessary in order to make these transcripts comprehensible. Although Newey had these transcripts in the court room (R. 376, 410), they were never offered in evidence.

2. The Government Misconstrues the Question Presented When It Asserts That the Trial Court "Excluded" the Tape Recordings.

The Government's brief thus states the second "Question Presented" (Br. 2):

> "Whether the court erred in holding that tape recordings of statements made by various agents of alleged conspirators, *which the court excluded*, were within the privilege attaching to the 'work product' of an attorney, and that such privilege had not been waived."

Nowhere in the record did the trial court exclude these tape recordings or the transcripts made from them. While refusing to compel McConnell to produce them, the trial court, as we have seen, expressly held that they would be admissible.

When these transcripts were in the court room pursuant to McConnell's letter to Newey, the trial court stated:

> "I think the transcript, from which he constantly read before each statement or two should be identified in the record and given a number" (R. 380).

In other words, instead of *excluding* the transcripts, the trial court was insisting that they be identified preparatory to their introduction in evidence.

The Government constructs its argument on the premise that McConnell waived his privilege (Br. 45-49). Whether he did or did not, the fact is that the Government subsequently had possession of the tapes and transcripts.

The Government refrained from offering them in evidence, for the reason, obvious on a reading of the cross-examination of Newey, that the transcripts did not support the claims of the Government.

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3. Although the Issue Is Moot, the Refusal to Compel McConnell to Produce His Work Product Was Correct, Since the Government Made No Showing of Good Cause for Compelling Its Production.

This Court has said:

> "But the general policy against invading the privacy of an attorney's course of preparation is so well recognized and so essential to an orderly working of our system of legal procedure that a burden rests on the one who would invade that privacy to establish adequate reasons to justify production through a subpoena or court order. That burden, we believe, is necessarily implicit in the rules as now constituted." *Hickman* v. *Taylor*, 329 U. S. 495, 512 (1947).

No attempt was made by counsel to advance "adequate reasons to justify" the proposed invasion of the privacy of McConnell's files. The trial court stated, and Mr. Jinkinson agreed, that the sole purpose of obtaining the recordings and transcripts was to "substantiate or support" the expected testimony of Newey (R. 167). At that time Newey had not testified, and no necessity of substantiation or support was apparent. The trial court based its ruling on this ground:

> "I don't see any reason for requiring him to turn over that or any other portion of his work papers or his preparation for trial on another case" (R. 169).

The trial court was obviously correct; the record does not contain the slightest bit of a showing of cause on the part of the Government.

The Government's brief (Br. 29) suggests that the rule requiring a showing of good cause has no application except in the case of discovery between adverse parties. But the passage quoted above stating the rationale of the *Hickman* decision is not couched in such limiting terms. The burden lies upon *"the one"*—any one—who seeks to in-

vade the privacy of counsel's preparations; the reasons for protecting that privacy stated by this Court apply equally to the invasion of that privacy by a stranger to the litigation. Especially is that so, when, as here, the result of that invasion is to provide opposing counsel with the very information they were denied when seeking it for themselves.

Nor does the type of material here involved change the rule. The *Hickman* case dealt in part with written witness statements comparable to the tape recordings and transcripts. While the *Hickman* case shows that compulsory production of written witness statements is not precluded under all circumstances, it was just this type of material to which this Court applied its caution that the burden of showing just cause lies on the seeker. On the contrary, "mental impressions and memoranda" were not subject to "any showing of necessity" (329 U. S. at 511-512) and hence not subject to compulsory production under any conceivable circumstances.

At the time of the ruling complained of, no showing was made that the Government was seeking facts which were "hidden in an attorney's file" and "essential" to the preparation or presentation of the Government's case. Absent even an attempt to make such a showing, and in the presence of an admission that the purpose was merely cumulative, the trial court's ruling was obviously correct.

4. The Government's Brief Misconstrues the Reason for the Trial Court's Holding That the Testimony of Newey Was "Valueless."

The Government's brief asserts (Br. 22, 23):

> "The court ultimately held, however, that Newey's testimony was 'valueless', because it was not based upon independent recollection, but upon a reading of the transcript and notes made therefrom. * * *"

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The same misstatement of the trial court's holding is repeated later in the brief (Br. 48, 49).

The fact is that the trial court disregarded the testimony, not because it was based upon the transcripts and notes, but because Newey was not truthfully reporting what was actually said in the conversations.

> "I now hold that the testimony [of Newey] is valueless. It consists, for the most part, of a series of *conclusions* by Newey, admittedly extracted from the transcripts of the recordings to suit the government's convenience. I shall therefore completely disregard the testimony of witness Newey" (R. 96).

This finding was made subsequent to the court's observation that:

> "Instead of using the recordings at this trial, the government summoned Newey. * * *" (R. 96).

The fact is that the "*conclusions*" which comprised Newey's testimony were shown on cross-examination to be a completely unreliable statement of what the tape recordings may have shown.

5. In the Absence of an Offer of Proof, the Government Cannot Rely on the Discredited Testimony of Newey to Show That It Was Substantially Prejudiced by the Trial Court's Ruling.

Having made no offer of proof as to what the transcripts showed, the Government now asserts that the discredited "conclusions" of Newey may be used to indicate what the transcripts contain.

The Government's brief (Br. 40, n. 22) asserts that the tapes "set forth conversations between Newey and agents of five of the defendants (Borden, Capitol, Western, Hunding, and Hawthorn) in which each agent told Newey that the dairies had an agreement not to take each

other's wholesale customers." *This statement is not supported by the record.* The contents of these tapes and transcripts are nowhere set forth or described, with the sole exception of the portions of one of them read on the cross-examination of Newey. In this instance, the portions read contradicted the assertions of Newey, and contained no such statements.

The references given in the Government's brief are not to the record, but to a previous portion of the Government's brief (Br. 23-25). These pages purport to summarize what Newey *testified* was said to him by the dairy representatives; but Newey was proved to have a faulty recollection and, so far as read, the transcripts do not substantiate his testimony.

The witness Newey admitted on cross-examination that he picked out the parts of the conversations he thought would help the Government's case. This, of course, means that the remaining portions of the conversations—all of which lasted from thirty-five minutes to an hour—probably contradicted the conspiracy theory.

The cross-examination of Newey showed clearly that his testimony omitted all reference to passages in the transcripts which rebutted the charge of conspiracy. For example, he omitted statements describing one defendant's solicitation of another defendant's business:

> "Q. Now, as a matter of fact, didn't Kost also tell you specifically he had been soliciting Bowman stops? A. No, he didn't.
>
> • • • • •
>
> Q. Now, I call your attention to Page 27, especially at the bottom of the page beginning with the remark that Mr. Kost made:
>
> 'Your deal here, he has got Bowman's, he has had Bowman's all of the time for many, many years.'

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And then at the bottom of the page Mr. Kost went on to explain:

'He is an old gent there. In fact, I tried to get his stop, and he says there is no sense wasting my time, or me wasting your time. He says I am going to have Bowman's in here regardless of what you offer me, or what you are going to do.'

Mr. Kost said that to you, didn't he?

* * * * *

It is in the transcript, isn't it, Mr. Newey? A. Yes" (R. 421, 422).

The cross-examination is replete with examples where Newey misstated not only the words but the purport of the conversations he had with the dairy salesmen. For example, Newey testified on direct examination that Kost, the Hawthorn salesman, told him "there was an agreement between his company and their company [Borden] whereby he could not take the stop." On cross-examination Newey admitted that such a statement had not been made to him, and that he had put in the mouth of Kost merely what in his tortured logic he believed Kost meant, but which was in fact exactly opposite to what Kost said:

"Q. Now, as a matter of fact, he never told you there was an agreement between the companies, did he? A. This was in reference to my first conversation with Mr. Kost?

Q. Your first conversation. And just after you had refreshed your recollection by looking at this transcript, wasn't it? A. Yes, sir.

Q. And there is not any reference on that transcript where he said that he had said that his company had an agreement with anybody, except what you may have put your own interpretation on? A. Let me see.

(Witness refers to document.)

* * * * *

A. On Page 20 here, when I was talking to Mr. Kost about Bowman and Borden, getting something

from Bowman and Borden, I said 'I don't think I could get anywhere, I mean, comparably, by calling Bowman in or Borden, and some of the others.'

And he says, Mr. Kost said, 'Bowman's, Borden's, I will be frank with you, if they spent a dime and they found they let their stops go, you would be surprised how many stops they have lost, they have lost a hundred stops because—'

Then I said, 'But they still have a few, you know. Of course, they have been doing something.'

And he said, 'They have been in business for 75 years. We have only been in business for 10 years, and we are the third largest dairy. I mean, if we stay in business another 10 years, and if we keep on going the way we are going, we would be the largest.

'Take Borden and Bowman stops, you drive along with me any time that you are free to go along with me, and I will show you that, I can prove it to you that I can take 10 stops today from them. I don't know for how long, but I could.'

By that he inferred that he was not taking their stops. There was some kind of a mutual understanding between them whereby he was not taking their stops" (R. 419, 420).

To the contrary, Kost was pointing out how easy it was to obtain Borden and Bowman customers because they had not "spent a dime."

Another illustration of Newey's complete disregard of the truth in reporting these conversations is as follows:

"Q. Now, I call your attention to your testimony at Page 2238 of the record. In response to a question, 'Did he (Kost) name the dairies whose stops could not be taken?' You answered, did you not, 'He named Weiland, he named Bowman, he named Western United, he named Borden's, and he named Beloit.'? A. Yes, sir.

Q. Now, where in your notes, Exhibits 1154—Exhibit 1154, do you find any reference to Beloit? A. On Page 3, where Mr. Kost had told me that Beloit had

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given John of John's Restaurant on Western Avenue, just across from Riverview, $50, and a $300 loan ten years ago.

Q. Is that what recalls to your mind that Mr. Kost said that he couldn't take Beloit stops? A. That is right.

Q. Now, as a matter of fact, that particular instance you have was Kost telling you about a stop he actually took from Beloit, wasn't it? A. I don't recall. I will have to refresh my memory.

Q. All right. Isn't it true that according to the transcript, 1153, Mr. Kost told you, 'I got a place up on Western Avenue right across from River Park, John's. He opened his restaurant just yesterday. I serve his son at 521 Damen Avenue, and his son wouldn't have anybody else but us in there. I have done George a lot of favors, and the father, as I say, I have been trying to get his business for two or three years, and he has Beloit.

'Beloit loaned him 10 years ago $300. They gave him $50 and a $300 loan, and he has never, regardless of what you would offer him, it doesn't mean anything, he still thinks Beloit is the only company on the street.'

Isn't that what Mr. Kost said to you? A. That is right (R. 420, 421).

Even the notes Mr. Newey prepared to use in aid of testifying showed that he departed freely from what was actually said in order to make a case. The following is one instance revealed by cross-examination:

Q. Now, you testified on record 2262, "I then asked him whether or not Belmont was giving any cash allowances to grocers to get the business. He told me they were."

Is that your testimony? A. Yes, that is right (R. 418).

Later he admitted that his notes read:

'Mills said his boss called Belmont, Belmont refused to give the cash money' (R. 419).

In other words, Newey's testimony as to the conversations he had had with the dairy salesmen was as full of untruths as the untruths he told the salesmen.[24]

The argument of the Government is a structure built by piling one unfounded or incorrect assumption upon another: *first,* the unfounded assumption that Newey was discredited for absence of independent recollection; the truth is he was discredited because he did not correctly report what was said to him as recorded in the transcript; *second,* the unfounded and incorrect assumption that what Newey said as to the contents of the recordings was correct; the truth is he misstated the contents of the recordings which may well have been innocuous; *third,* the unfounded assumption that the tape recordings "contained admissions by the defendants that the dairies had an agreement not to take each other's customers" (Br. 48). Absent an offer of proof quoting from the transcripts, the record is devoid of any credible basis for making such an assertion.

Since the Government was in possession of the tapes and recordings it presumably elected to rely solely upon the testimony of the witness Newey. With respect to his testimony, the court found:

> "At the trial, witness Newey was without any apparent present recollection of his conversations with the defendants' representatives. He used notes, assertedly to refresh his recollection, but his testimony

24. Newey admitted he gave a false name, and told the salesmen at least seven other untruths (R. 408). He also admitted in addition to the corrections and explanations he had made of the tapes (R. 405) that it would be perfectly possible to physically edit the tapes by cutting out portions, taping together the two ends and then rerunning a new tape which would show no evidence of such editing (R. 424). Newey further testified that merely by throwing a switch on a tape recorder, one could black out any part of a conversation that was undesirable or could erase any part of it (R. 428).

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appeared to be and was largely a paraphrase of these notes. These notes were not his past recollection recorded, but were made by him shortly before his appearance on the stand from a reading of transcripts of the various tape recordings. One of these transcripts was also used to refresh his memory. The aforementioned notes were admittedly extracted from the transcripts of the tape recordings to suit plaintiff's convenience. The court completely disregards the testimony of witness Newey and holds that his testimony is valueless" (Fdg. 20; R. 118, 119).

The Government never offered in evidence the tapes or the transcripts or made any offer of proof with respect thereto. It has been repeatedly held that a party must make an offer of proof with respect to excluded evidence to preserve the ruling on appeal so the reviewing court is able to determine whether the ruling involved reversible error.[25] This, the Government in the instant situation, completely failed to do.

To sum up: This Court is asked by the Government

25. In *Palmer* v. *Hoffman*, 318 U. S. 109, 116 (1943), this Court said:

"One of respondent's witnesses testified on cross-examination that he had given a signed statement to one of respondent's lawyers. Counsel for petitioners asked to see it. The court ruled that if he called for and inspected the document, the door would be opened for respondent to offer the statement in evidence, in which case the court would admit it. See *Edison Electric Light Co.* v. *United States Electric Light Co.*, 45 F. 55, 59. Counsel for petitioners declined to inspect the statement and took an exception. Petitioners contend that that ruling was reversible error in light of Rule 26 (b) and Rule 34 of the Rules of Civil Procedure. We do not reach that question. Since the document was not marked for identification and is not a part of the record, we do not know what its contents are. It is therefore impossible, as stated by the court below, to determine whether the statement contained remarks which might serve to impeach the witness. Accordingly, we cannot say that the ruling was prejudicial even if we assume it was erroneous."

See also *Herencia* v. *Guzman*, 219 U. S. 44, 46 (1910).

to assume what the trial court found not to be true—that Newey's testimony as to what was said to him was correct. This Court is then asked to assume what the record itself rebuts—that the transcripts and tapes would have confirmed what Newey said. This Court is asked to assume this in the face of an utter failure of the Government either to offer the transcripts or tapes, or to show by an offer of proof that they would substantiate what the discredited Newey had testified. This Court is asked to assume that the Government was hurt by the refusal of the court to help Government counsel get possession of material which they later acquired by other means.

The fact is that, after Newey was cross-examined on the basis of his notes and one of the transcripts, counsel for the Government on redirect (R. 426-428) completely abandoned any effort to use the notes and transcripts to rehabilitate the witness. This Court is entitled to draw the obvious inference.

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C. The Trial Court Properly Excluded the Proffered Evidence of a Single Innocuous Conversation Between a Non-Defendant Dairyman and a Deceased Agent of a Single Defendant Occurring Ten Years Before the Trial.

The third evidentiary ruling complained of by the Government relates to an offer to prove that the witness, Moser, an executive of Lake Valley, a dairy which is not even mentioned in the complaint, had a conversation in 1943 with a deceased Borden agent. There is absolutely nothing in the offer which has any relevance whatever to the charge that Borden was engaged in a conspiracy with the parties named in the complaint or that Borden was violating the Clayton Act, as charged in the complaint.

Even if the offer of proof were material, since it related to a conversation with a dead man which took place over ten years ago, under applicable Illinois authorities the trial court properly refused to consider it.

The rule that such testimony of a conversation with a dead man is of little or no weight is an old and respected rule of Illinois law:

> "Furthermore, the testimony of Maas, given after Grace's death, that such a statement was made by Grace, should be received with caution and it is entitled to little weight." *Chicago Title & Trust Co.* v. *Merchants' Loan & Trust Co.*, 244 Ill. App. 302, 311 (1st Dist., 1927).

The Illinois Supreme Court has adopted with approval the language of this Court on the subject:

> "The Supreme Court of the United States, in *Lea* v. *Polk County Copper Co.*, 62 U. S. 493, observed that 'courts of justice lend a very unwilling ear to statements of what dead men have said.'" *Moreen* v. *Estate of Carlson*, 365 Ill. 482, 489 (1937).

With respect to the statements of dead men, the Illinois

Courts merely apply with greater force the same tests of probative value applied to evidence of verbal admissions generally:

> "As is well said by Greenleaf, in his work on Evidence, Sec. 200: 'With respect to all *verbal* admissions it may be observed that they ought to be *received with great caution*—the evidence consisting, as it does, in the mere repetition of oral statements, is subject to much imperfection and mistake: the party himself either being misinformed, or not having clearly expressed his own meaning, or the witness having misunderstood him. It frequently happens also that the witness, by unintentionally altering a few of the expressions really used, gives an effect to the statement completely at variance with what the party actually did say.'" *Bragg* v. *Geddes,* 93 Ill. 39, 60 (1879) (Emphasis in original text).

The mere fact that Section 4 of the Illinois Evidence and Depositions Act (Br. 4) has a narrow application and a more rigorous impact—that of making the witness incompetent—has been seized upon by the Government for the purpose of criticizing the trial court for refusing an offer that on its face (R. 65) has no probative value and could readily have been refused under the authorities cited above.

The trial court was obviously correct in refusing to receive evidence of a conversation with a dead man ten years after the event, especially when the conversation was entirely irrelevant to the issues in the case. How any possible prejudice inured to the Government's case defies rational explanation.

Summary as to Evidentiary Matters.

The Government asks this Court to reverse the considered, thorough, and detailed appraisal of the evidence by the trial court, after a trial lasting three weeks following

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an extensive pretrial proceeding, after the appearance of 65 witnesses and the reception and study of more than a thousand exhibits, because of three rulings on points of evidence.

To state the nature of these rulings is to make clear their propriety. One ruling excluded an ambiguous and irrelevant conversation with a dead man occurring more than ten years before the witness took the stand. Another ruling simply refused to compel an attorney in private litigation to produce his work product to assist the Government in making up the deficiencies in its own case, and was nullified in any event by the subsequent possession of that work product by Government counsel, who, possessing it, and knowing what was in it, made no effort to offer it into evidence or even to make an offer of proof. The third ruling denied an offer of proof to show that in a deposition taken in another case, and under the protection of a court order, a witness called by the Government itself in the present case had made allegedly inconsistent statements which the offer of proof itself showed were not inconsistent and not impeachment.

II.

THE TRIAL COURT PROPERLY DISMISSED THE CLAYTON ACT PORTIONS OF THE COMPLAINT ON THE GROUND THAT THE GOVERNMENT FAILED TO PROVE ANY RIGHT TO INJUNCTIVE RELIEF.

In its complaint the Government alleged that the defendants were violating and will "continue" to violate the Clayton Act unless relief is granted. The Government failed to prove this allegation and the trial court dismissed the complaint pursuant to Rule 41(b). It necessarily held that "upon the facts and the law plaintiff has shown no right to relief."

There is nothing in the record or the Government brief showing that the Government is entitled to injunctive relief against any threatened violations of the Clayton Act. The Government completely failed to prove any discriminatory sales by Beloit. It has introduced *prima facie* evidence of some old violations by Bowman and Borden, but even this "conflicting" evidence shows that affirmative defenses are available to each of the defendants to justify these old violations (R. 108).

The Government's burden on this appeal is to demonstrate that affirmance of the trial court's order dismissing the complaint will result in substantial injustice. Except for the *prima facie* evidence of some old violations, there is nothing in the record to show that the Government has any right to Clayton Act relief. Certainly, the Government has not met its burden of showing that the chancellor abused his discretion in determining that the entry of an injunctive decree would be "a useless task" (R. 111).

The Government has taken the position that as a matter of law it has a *right* to obtain equitable relief against future violations if it proves that a defendant has at some time in the last ten or fifteen years committed some violation of the Clayton Act. This position is never bluntly stated in these words, but, in view of the flimsy nature of its proof, this is the legal position that the Government necessarily must take in urging reversal of the district court.

No litigant has a *right* to injunctive relief merely by showing past violations of a statute. In denying such a claim, this Court has said:

> "We are dealing here with the requirements of equity practice with a background of several hundred years of history. Only the other day we stated that 'An appeal to the equity jurisdiction conferred on federal district courts is an appeal to the sound discretion which guides the determinations of courts of equity.' *Meredith* v. *Winter Haven*, 320 U.S. 228, 235. The his-

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> toric injunctive process was designed to deter, not to punish. The essence of equity jurisdiction has been the power of the Chancellor to do equity and to mould each decree to the necessities of the particular case. Flexibility rather than rigidity has distinguished it." *Hecht Co.* v. *Bowles*, 321 U. S. 321, 329 (1944).

The applicability of this basic equitable principle has frequently been recognized in antitrust litigation. That it is within the chancellor's discretion to refuse to grant the Government any relief if none is needed to protect the public interest was recently held by this Court in the *Grant* case.

> "[The Government] must satisfy the court that relief is needed. The necessary determination is that there exists some cognizable danger of recurrent violation, something more than the mere possibility which serves to keep the case alive. The chancellor's decision is based on all the circumstances; his discretion is necessarily broad and a strong showing of abuse must be made to reverse it." *United States* v. *W. T. Grant Co.*, 345 U. S. 629, 633 (1953).

In the present case the chancellor found no cognizable danger of current violation of the Clayton Act. There is nothing in the record or the Government brief to indicate that such a "necessary determination" of a "cognizable danger" should have been made by the trial court.

The Government does not attack the express finding that Bowman, Borden, Ridgeview and Belmont are already effectively enjoined by the terms of the *Dean* decree from performing any of the acts set forth in plaintiff's prayer for injunctive relief (Fdg. 38; R. 123).

The Government has not pointed to a single substantial reason to support its charge that the trial court abused its discretion. The repeated assertion that the "need" for a decree has been demonstrated is unsupported by reference to the facts evidencing this supposed "need."

The remaining contentions of the Government largely answer themselves. The fact that the Attorney General may or may not have a duty to seek an injunction whenever he discovers evidence of a violation of the antitrust laws (Br. 52, 53) does not bear in any way on the function of the chancellor. So long as the courts have their independent part to play in the administration of justice, the supposed compulsion upon the executive branch to initiate proceedings does not compel nor even affect the traditional exercise of discretion by the chancellor.

The Government points out that the entry of a decree in an action filed by a private party under Section 16 of the Clayton Act does not terminate the Attorney General's duty to enforce the antitrust laws by proceeding under Section 15. In other words, if the defendants are violating the Clayton Act, the Attorney General may have the duty to institute an appropriate proceeding to enjoin such violations. This he may do without regard for the outcome of the instant case. *United States* v. *Oregon State Medical Society*, 343 U. S. 326, 339-340 (1952). But he must prove "some cognizable danger of recurrent violation" in order to satisfy the court that equitable relief is needed.

The Government also points out that it could not bring contempt proceedings to enforce compliance with the *Dean* decree without first intervening in that action (Br. 53-55). But certainly the burden on the Government of filing a petition for leave to intervene in the *Dean* case does not require the district court to be burdened with the supererogation of a second decree. The fact that the allowance of an intervening petition is a matter of discretion is of no significance. For if in fact the Government could prove some cognizable danger of violation of the decree, the chancellor would certainly allow intervention. A contrary argument assumes that compliance with an injunction issued in private litigation is a matter which concerns the

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private litigant only; it ignores the power and inclination of courts to enforce obedience of their decrees.

Finally, the assertion that the *Dean* decree may become ineffective because the private parties "may seek modifications" has no more support in the record than the asserted "need" for a second decree. The Bowman petition set forth in the Appendix to the Government's brief was an effort to extend the scope of the decree; and the refusal of the trial court to grant this petition[26] to move against additional parties leaves the field open for the Government—thus advised of violations of law—to move in a direction which really may protect the public.

CONCLUSION.

It is respectfully submitted that the appeal is wholly without merit and should be dismissed.

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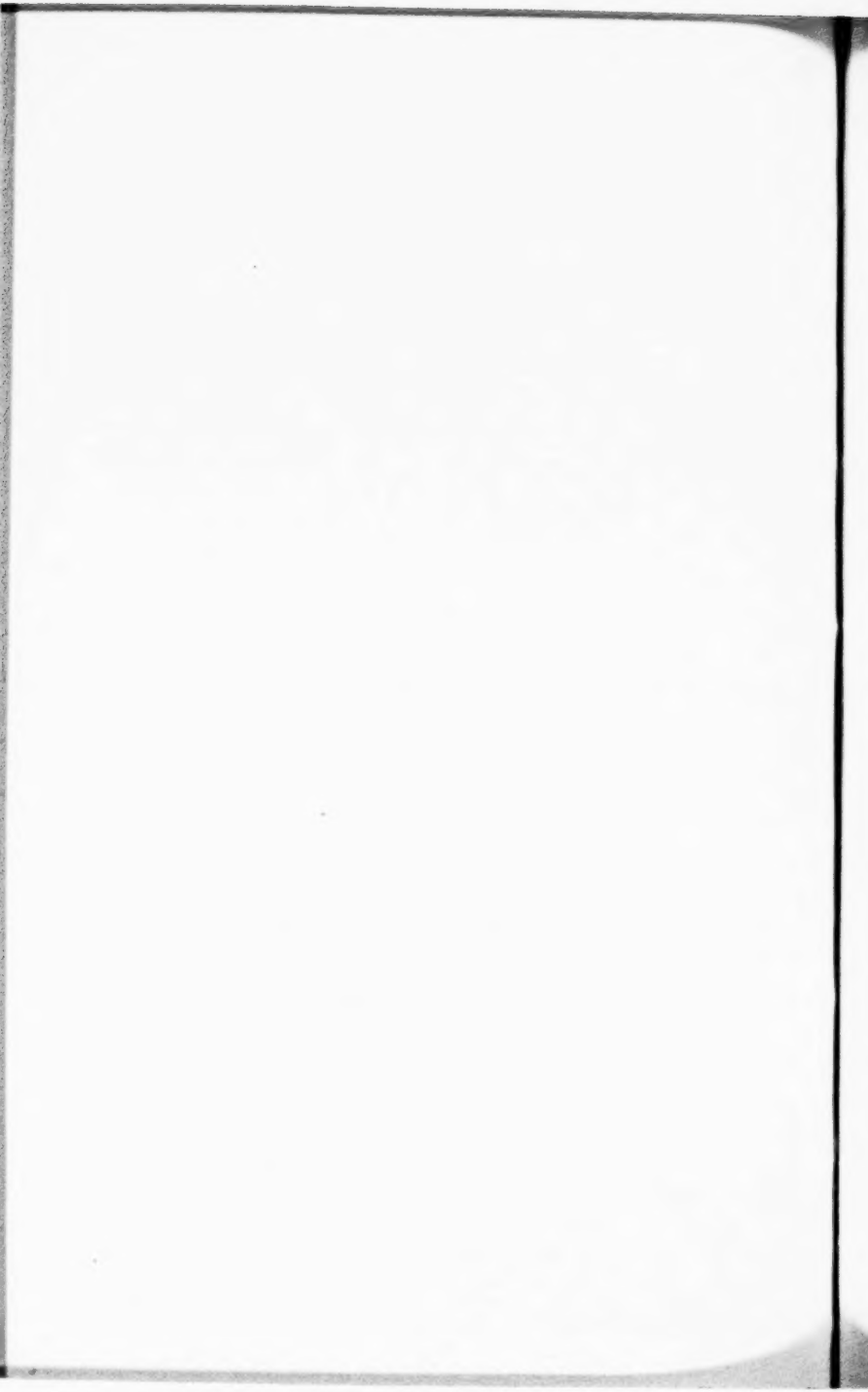
Of Counsel:
SIDLEY, AUSTIN, BURGESS & SMITH,
MONTGOMERY, HART, PRITCHARD & HERRIOTT.

26. On April 7, 1954 Judge Igoe entered an order dismissing the Bowman petition.



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APPENDIX.

UNITED STATES DISTRICT COURT.
Northern District of Illinois,
Eastern Division.

Dean Milk Company, a Corporation, *Plaintiff*, *vs.* American Processing and Sales Company, Inc., a Corporation, *et al.*, *Defendants.*	Civil Action No. 49 C 1159

MOTION FOR AN ORDER AUTHORIZING THE CLERK OF COURT TO UNSEAL AND OPEN DEPOSITIONS.
Filed January 28, 1953.

The undersigned moves the Court for an order authorizing the Clerk of this Court, on such conditions as the Court sees fit to impose, to open the depositions which are sealed and are on file in this action.

The undersigned is of counsel for the Government in the action pending in this district entitled *United States* v. *The Borden Company, et al.*, Civil Action No. 51 C 947, hereafter referred to as the *Borden* case, which is set for trial before the Honorable William J. Campbell for February 16, 1953.

Said motion is made on the grounds that many of the issues in the two cases are the same and that said depositions contain testimony relating to such issues; that from

time to time the Court in the *Dean* case, at the instance of parties in the *Dean* case, has entered orders requiring the Midwest Office of the Antitrust Division, Department of Justice, to make documents available for inspection of parties in the *Dean* case, and pursuant to said orders and arrangements between counsel for plaintiff and defendants in the *Dean* case, the Antitrust Division has permitted said inspection and said parties have inspected documents which are material to the issues in the *Borden* case and have taken depositions in the *Dean* case relating to said documents; that the opening of the depositions in the *Dean* case for examination by the Government for purposes of the *Borden* case will expedite the trial of the *Borden* case, simplify the issues, and promote the due administration of justice.

Said motion will be based on the affidavit of Ralph M. McCareins annexed hereto and the records in the files of the *Dean* and *Borden* cases.

s/ RALPH M. MCCAREINS,
Attorney for the United States,
Room 400,
United States Courthouse,
219 South Clark Street,
Chicago 4, Illinois,
HArrison 7-4700.

AFFIDAVIT.

STATE OF ILLINOIS, }
COUNTY OF COOK. } ss.

Ralph M. McCareins, being duly sworn, on oath states that he is of counsel for the plaintiff in the action pending in this district entitled *United States* v. *The Borden Company, et al.*, Civil Action No. 51 C 947, hereafter referred to as the *Borden* case.

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It appears from records in the file of the action in this district entitled *Dean Milk Company, a Corporation, Plaintiff* v. *American Processing and Sales Company, Inc., a Corporation, et al., Defendants,* No. 49 C 1159, hereafter referred to as the *Dean* case, that the Court in the *Dean* case entered orders on July 25, 1951 and on August 2, 1951 requiring certain of the defendants in the *Dean* case to produce certain documents which were in the custody of the Midwest Office of the Antitrust Division, Department of Justice, that on October 9, 1951 and February 28, 1952, the Court in the *Dean* case entered orders requiring the Midwest Office of the Antitrust Division, Department of Justice, to permit the inspection of documents in the possession of the Antitrust Division by parties to the *Dean* case; that from time to time after July 24, 1951, pursuant to said orders and arrangements between counsel for plaintiff and defendants in the *Dean* case, various parties in the *Dean* case inspected documents in the custody of the Antitrust Division; that the documents so inspected included documents which are relevant to the issues in the *Borden* case and which the Government intends to use in the trial of the *Borden* case.

From the names of witnesses whose depositions were taken in the *Dean* case, it appears that their testimony may relate to documents which are in the custody of the Antitrust Division and which were examined by parties in the *Dean* case as aforesaid and which documents are material to the trial of the *Borden* case.

s/ RALPH M. MCCAREINS.

Subscribed and sworn to before me this 27th day of January, 1953.

s/ KATHRYN M. REILLY,
Notary Public.

My commission expires March 23, 1953.

UNITED STATES DISTRICT COURT.
Northern District of Illinois,
Eastern Division.

Dean Milk Company, a Corporation, *Plaintiff*, *vs.* American Processing and Sales Company, Inc., a Corporation, *et al.*, *Defendants.*	Civil Action No. 49 C 1159.

MOTION FOR CONTINUANCE.
Filed March 11, 1953.

Comes now the United States of America, by its attorneys, Earl A. Jinkinson, Special Assistant to the Attorney General, Harry H. Faris, Thomas M. Kerr, Jr., Bertram M. Long, and Thomas A. Rothwell, Trial Attorneys, and respectfully moves the Court that the motion of the defendants, Bowman Dairy Company and The Borden Company, for a resealing of the depositions heretofore filed in the above entitled cause be continued for the following reasons:

1. That under Rule 6(d) of the rules as made and provided for in the Federal Rules of Civil Procedure, the movant herein, the United States of America, has not been given the five days' notice as provided for by said rule, and, therefore, said movant is entitled to a continuance in said cause;

2. That the United States of America is presently engaged in the trial of a cause entitled *United States of America* v. *The Borden Company, et al.*, Civil Action No. 51 C 947,

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now being heard before the Honorable William J. Campbell, one of the Judges of this Court; that said Court is presently engaged in the taking of oral testimony in said cause;

WHEREFORE, the United States of America respectfully moves that it be granted a continuance in said cause until the case, No. 51 C 947, now pending and being tried, has been fully submitted to the Court, or for five days in accordance with Rule 6(d) of the Federal Rules of Civil Procedure.

s/ Earl A. Jinkinson,
Special Assistant to the Attorney General,

s/ HARRY H. FARIS,
s/ THOMAS M. KERR, JR.,
s/ BERTRAM M. LONG,
s/ THOMAS A. ROTHWELL,
Trial Attorneys,
Room 400,
United States Courthouse,
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HArrison 7-4700.

APR 20 1954
HAROLD B. WILLEY, CL

IN THE

Supreme Court of the United States

OCTOBER TERM, 1953.

No. 464

UNITED STATES OF AMERICA,
Appellant,

vs.

THE BORDEN COMPANY, ET AL.,
Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF ILLINOIS.

BRIEF OF BELOIT DAIRY COMPANY, APPELLEE.

LEO F. TIERNEY,
CHARLES L. STEWART, JR.,
Attorneys for Beloit Dairy Company.

MAYER, MEYER, AUSTRIAN & PLATT,
Of Counsel.

THE GUNTHORP-WARREN PRINTING COMPANY, CHICAGO

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Rule.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1953.

No. 464.

UNITED STATES OF AMERICA,

Appellant,

vs.

THE BORDEN COMPANY, ET AL.,

Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF ILLINOIS.

BRIEF OF BELOIT DAIRY COMPANY, APPELLEE.

OPINION BELOW.

The District Court's memorandum and order dismissing the complaint (R. 80-133) is reported at 111 F. Supp. 562. The opinion and order limiting the issues and the proof (R. 48-52), and the findings of fact, conclusions of law, and judgment (R. 113-125) are not reported.

JURISDICTION.

On March 30, 1953, the District Court entered an order dismissing the complaint (R. 112). On June 17, 1953, the District Court entered its findings of fact, conclusions of

law and judgment (R. 113). On August 6, 1953 plaintiff's timely motion for a new trial was denied (R. 161). The appeal was allowed on October 2, 1953 (R. 43). The jurisdiction of this Court was invoked under Section 2 of the Expediting Act, 32 Stat. 823, 15 U. S. C. 29, as amended 62 Stat. 869. On October 19, 1953, this appellee filed a separate motion to dismiss or affirm as to it. The Court noted probable jurisdiction on December 14, 1953 (R. 443).

QUESTION PRESENTED.

With respect to the dismissal below of the Government's claims against Beloit Dairy Company under Sections 1 and 2 of the Sherman Act, the question is whether the trial court excluded any competent evidence which, in conjunction with competent evidence admitted at the trial, would prove that Beloit conspired with the other defendants to restrain trade in fluid milk as alleged in the complaint.

No question has been brought to this Court concerning the trial court's dismissal of the Government's claim against Beloit for violation of Section 2(a) of the Clayton Act.

STATEMENT.

This suit was filed on June 18, 1951, by the United States against ten Chicago dairies, seeking to enjoin an alleged conspiracy to restrain and monopolize the wholesale market for fluid milk in the Chicago area of Illinois, and to enjoin price discriminations by each defendant in sales to its various wholesale customers. The complaint relied upon Sections 1 and 2 of the Sherman Act and Section 2(a) of the Clayton Act as amended.

The gist of the alleged violation of the Sherman Act was that defendants had conspired to allocate the patronage of some of the local grocery stores, restaurants, hotels

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and institutions, including public institutions, among themselves in that each agreed not to solicit, bid for or accept the patronage of such customers served by any of the other defendants.

On June 26, 1952, the trial court denied defendant's alternative motions to dismiss the complaint for failure to state a claim or to strike the complaint for joining too many diverse claims (R. 7).

For a further statement of the general development of this case, this Appellee adopts the Statement appearing in the Brief of Appellees The Borden Company, Belmont Dairy Company, Ridgeview Farms Dairy, Inc., and Bowman Dairy Company.

Beloit calls particular attention to the fact that it was not a party to the suit filed in 1949 by the Dean Milk Company against the other defendants, in preparation for which the disputed tape recordings were made (R. 423). No Beloit representative was among the solicitors questioned by plaintiff's lawyer Newey, when he was making the records (Gov't Br. p. 21, note 12). Moreover, Beloit was not notified of the taking of the disputed deposition of H. C. Eggleston by the plaintiff in the *Dean* case. Beloit was not represented there (R. 52, Gov't Br. p. 35, note 18), nor has the Government offered to prove (R. 52-64) that Beloit was referred to in either the questions or the answers.

All of the smaller independent defendant companies in the present case except Beloit were parties to the *Dean* case, and consented to the decree in that case (R. 109-110, 122-123) and all entered into a consent decree with the Government in this case (R. 41-48). Beloit elected to stand trial.

Much of Beloit's competition came from other small dairies not named as defendants. Beloit had its problems with these competitors, which it handled by itself, without

the knowledge, consent or assistance of any other defendants. When Lake Valley Farm Products took Beloit's one public institution customer (Municipal Tuberculosis Sanitarium) (R. 105) from Beloit, Lake Valley was threatened with retaliation in kind by Beloit (R. 104). In a similar instance, Beloit retaliated by submitting a low bid for the patronage of another institution (Home for Incurables) (R. 105), usually served by another non-defendant dairy which had taken the Sanitarium business from Beloit (R. 105). After reviewing the testimony of non-defendants which had obtained the patronage of the Municipal Tuberculosis Sanitarium at various times, along with a comparable instance involving other parties, the trial court said (R. 105):

> "Each incident involves the action taken by one defendant dairy when another dairy attempted to capture an account. Beloit, for example, looked upon the Sanitarium as 'its account'; and Beloit became aggressive when another dairy bid for Beloit business. The court holds however, as it must, that these four isolated instances cannot establish the existence of a conspiracy among ten defendant dairies."

The trial court's Finding of Fact on the subject of these instances, number 28 (R. 120-121), is:

> "With respect to each of the foregoing incidents, there is no evidence of threats of reprisals or reprisals by any defendant other than the defendant which had most frequently been serving the institution prior to the bid by the non-defendant milk distributor. Nor is there any evidence that the making of these threats of reprisals or reprisals by any particular defendant were known to any of the other defendants."

The Government's evidence of Beloit's relationship to other defendants (of which there were nine) consisted of testimony of three former employees of one co-defendant that they understood from conversations with their respec-

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tive supervisors, at Bowman, that they were not to solicit Beloit customers (R. 86, 87, 365). Three other Bowman solicitors were not told about aggressive little Beloit as a dairy of which to be wary (R. 85, 86-87). The Government did not question the supervisors of Herbert Horton, Johnston or Heinz to corroborate their testimony as to the instructions they were given, although one of the supervisors (Buthman) was on the stand later (Trial Transcript 1838, *et seq.*). Horton and Heinz did not state any reasons given them for not soliciting Beloit stops, nor did either state that there were any Beloit stops in their sales territories. Johnston said his supervisor told him to go ahead and take the Beloit stop he wanted (R. 87), and that Bowman later gave it up or lost it to Wanzer, a non-defendant dairy (R. 87).

Having reviewed the testimony of such former solicitors, the court stated (R. 88):

> "Each of the witnesses is a former employee of one of the defendants, and each expressed some degree of animosity toward his former employer. Johnston, in particular, was hostile during cross-examination, and as I noted earlier, the Bowman Company had once accused him of dishonesty. The testimony of each of the witnesses is, therefore, open to some suspicion. Assuming arguendo that all of the foregoing testimony is true, however, just what relationship among the defendants is indicated? * * *
>
> "* * * Three Bowman solicitors testified that they were similarly instructed not to solicit stops served by Borden and certain other dairies. However, the court notes that the instructions which these solicitors said they received are at variance with the terms of the conspiracy alleged in the complaint. * * *"

This testimony was admitted over objection made by Beloit (R. 153) "to testimony as to conversations between employees of other defendants, * * * as not binding upon the

objecting defendant, as hearsay, and as not competent t
prove any issue in the case with respect to it."

The trial judge overruled the above and other objection
when they were made, with the reservation that (R. 155)

> "at the end of all the evidence, if it appears that dat
> is not connected up, * * * or if it appears from th
> final testimony that some of it is purely hearsay, tha
> that may still be argued by the parties * * *."

After the Government had rested, Beloit argued that thi
testimony was hearsay and not connected up by any indc
pendent evidence showing Beloit was a co-conspirato
bound by Bowman employee's admissions, and the cour
agreed.

In his opinion reviewing the evidence, the Trial Judg
said (R. 106):

> "Needless to state, there is no direct evidence o
> an agreement or understanding among the defendants
> There is no evidence of intercorporate communicatio
> or of significant meetings between alleged conspira
> tors, although the evidence purports to cover a perio
> of over twelve years. The Government must rely, then
> upon inferences drawn from the conduct of the defend
> ants."

There was no evidence of actions by Beloit consistent
with the alleged terms of the conspiracy. Beloit was not
shown ever to have:

(1) Instructed any solicitor not to solicit customers
of any other dairies,

(2) Refused to serve a customer of any other dairy
desiring to purchase Beloit products,

(3) Traded stops with any other dairy,

(4) Suggested to a customer of a defendant dairy
that he buy from another small dairy for awhile before
starting to buy from Beloit ("farm-outs").

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Nor was it shown that Beloit had knowledge of the instructions which Herbert Horton and Heinz said their supervisors at Bowman gave them, to leave Beloit's stops alone or the instructions which Johnston said he was given, to take one stop from Beloit covertly by means of a "farm-out" to Wanzer.

Beloit was a small dairy which "became aggressive" when business was taken from it by competitors (R. 105). There was no evidence that Beloit was less "aggressive" in defending itself against its co-defendants than in competing with non-defendants. Beloit did not compete against the Dean Milk Company, which was a rising challenger in the paper carton market (grocery stores) but did not sell in the bulk market (hotels and restaurants). Hence, Beloit had lost no restaurant or hotel trade to Dean, and Beloit did not try to get store customers from Dean. Thus Beloit was not confronted by similar problems and did not act in a way parallel to Bowman and Borden (R. 107).

After hearing closing arguments, the Court found (Finding of Fact number 34, R. 121):

> "All the evidence competent as to Beloit fails to establish the existence of a conspiracy, as alleged in the complaint, or the participation therein by Beloit."

Thus the evidence admitted at the trial did not show that Beloit conspired with others, and did not show conduct from which any inference of such conspiring by Beloit might have been drawn.

As to the Clayton Act claim against Beloit the trial court's Finding of Fact Number 35 (R. 121) was that:

> "The plaintiff has offered competent and creditable evidence of only one sale by Beloit to a wholesale customer; that was the sale of certain dairy products to the Eitel Restaurant in Chicago in 1947."

And its Conclusion of Law Number 8 (R. 124) was that

> "In order to establish an unlawful discrimination in price under Section 2(a) of the Clayton Act, as amended, the plaintiff must prove the occurrence of at least two sales. Therefore, with respect to Beloit, the plaintiff has not shown a right to relief under Section 2(a) of the Clayton Act."

SUMMARY OF ARGUMENT.

The Government did not prove the existence of the conspiracy alleged in the Complaint, nor the participation by Beloit in such a conspiracy. Whether or not the evidence excluded from the record by the rulings complained of on this appeal might have helped to establish the existence of a conspiracy, none of such evidence would help to establish the participation of Beloit Dairy Company therein.

Where there is no competent evidence which could support a judgment against one alleged co-conspirator, the dismissal of that individual party should be affirmed. Since the Government concedes the lack of any evidence sufficient to establish Beloit's liability in the record of the trial, and does not show that any such evidence was offered and excluded, the judgment dismissing this case as to Beloit should now be affirmed.

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ARGUMENT.

I.

Unless the Trial Court Improperly Excluded Competent Evidence That Beloit Conspired With the Other Defendants to Restrain Trade in Fluid Milk as Alleged in the Complaint, the Dismissal of the Case Against Beloit Should be Affirmed.

The Government does not appeal from the trial court's findings that no conspiracy was proved, but, on the contrary, states (Brief 32) at the beginning of its Argument:

> "We do not challenge the court's conclusion that, on the record before it, the Government had not shown conspiracy. But we do contend that, if the court had permitted the Government to utilize and introduce the foregoing excluded evidence, it could not reasonably have granted the motion to dismiss the complaint."

Obviously, if the Government did not *offer* any competent evidence that Beloit conspired with the other defendants to restrain trade in fluid milk as alleged in the complaint, it cannot complain of the fact that the trial court granted Beloit's individual motion to dismiss, read into the record at the close of the Government's case after the Government had rested. This motion appears at page 429 of the printed record.

The dismissal of the Government's claim against Beloit should be affirmed by this Court irrespective of whether the excluded evidence might establish a conspiracy between defendants other than Beloit. In *Bailey* v. *Zlotnick*, 133 F. 2d 35, 38 (App. D. C., 1942), the case had been dismissed against all three defendants by the trial court. The complaint alleged that the defendants were jointly

liable to the plaintiff in tort. The Court of Appe found that the dismissal was proper as to the defend Beloff but erroneous as to the other two defendants, affirmed the judgment of dismissal as to Beloff only. also *Washington Gas Light Co.* v. *Lansden,* 172 U. S. (1899).

The Government's burden in this Court is to show t Beloit would have been convicted of conspiring with other defendants if the trial court had admitted (1) deposition of H. C. Eggleston, to impeach the creditabi of Eggleston's trial testimony and enhance the creditabi of Heinz' deposition, (2) the tape recordings made by att ney Paul Newey in preparing the case of *Dean Milk C pany* v. *American Processing and Sales Company, I et al.,* for trial, and (3) the testimony of Hans Moser as his conversation with the deceased Mr. Baril.

II.

None of the Evidence Excluded by the Trial Court De With Beloit or Its Alleged Participation in a Conspi acy.

None of the points raised by the Government on this peal, and none of the "Questions Presented" (p. 2 Government brief), would, however decided by this Cou open the way to proof that Beloit conspired with anyo refrained from soliciting anyone, or refused to sell anyone.

The Government specifies (Br. 26-27) that the dist court erred in refusing to receive (1) the deposition gi by Eggleston in the *Dean* case offered for the purpose impeaching his trial testimony in this case, (2) tape reco ings made by the Government's witness, Newey, and testimony by the Government's witness, Moser, as to a c versation with Baril, a deceased agent of Borden. Unl

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one or all of these alleged errors substantially affected the rights of the Government against Beloit Dairy Company, the judgment dismissing Beloit Dairy Company must be affirmed on this appeal (see Note 8 in Brief of the other Appellees, p. 19). We shall consider the three items in the order listed above.

1. The Eggleston Deposition in the Dean Case.

Eggleston said nothing about Beloit at the trial, and the Government does not show that Eggleston mentioned Beloit in his deposition in the *Dean* case. Moreover, the deposition could not have been used against Beloit Dairy Company, even for the purpose of contradicting or impeaching Eggleston's testimony as a witness if there had been a conflict of statements on the two different occasions. This is so because Beloit was not present or represented at the taking of the deposition and had no notice thereof, not being a party to the *Dean* case.[1]

The Government asserts that the court would have had less reason to doubt the testimony of its witness Heinz, if it had been allowed to impeach Eggleston with the aid

---

1. Rule 26(d), F. R. C. P., restricts the use of depositions in the following terms:

> "*Use of Depositions.* At the trial * * *, any part or all of a deposition, so far as admissible under the rules of evidence, may be *used against any party who was present or represented at the taking of the deposition or who had due notice thereof,* in accordance with any one of the following provisions:
>
> '(1) Any deposition may be used by any party for the purpose of contradicting or impeaching the testimony of deponent as a witness.' " (Emphasis supplied.)

Thus a deposition which contradicts or impeaches the deponent's testimony as a witness may be used only against parties which had notice of, or attended or were represented at, the taking of the deposition. This rule forbids use of a deposition against a non-participant, whether the purpose is impeachment or other purposes, since the limitation in the first sentence of Rule 26(d) applies equally to all of the provisions in the subparagraphs which follow the first sentence.

of the deposition. However, there was no conflict of testimony between Eggleston and Heinz which had any bearing on the allegations as to Beloit. Even if the court, might have given more credence to Heinz' testimony, had it given less credence to that of Eggleston, it would have found nothing in Heinz' testimony to affect its judgment dismissing Beloit.

Heinz mentioned Beloit only once, at which time he stated that in 1936, long before the cut-off date of September 16, 1940, his supervisor at Bowman had directed him not to solicit stops being served by Beloit. Heinz did not say whether any reason was given for this instruction. Moreover, this testimony was clearly incompetent hearsay as to Beloit.

As this Court stated in *Glasser* v. *United States,* 315 U. S. 60 (1942), declarations of one conspirator in furtherance of the objects of the conspiracy "are admissible over the objection of an alleged co-conspirator, who was not present when they were made, only if there is proof *aliunde* that he is connected with the conspiracy * * *. (Citing cases.) Otherwise hearsay would lift itself by its own boot straps to the level of competent evidence." See also, *Bihn* v. *United States,* 328 U. S. 633 (1946). The cases cited by the Government (note 22 on pages 40-41) are all cases in which there was independent proof of the conspiracy. In *American Tobacco Co.* v. *United States,* 147 F. 2d 93, 118 (C. A. 6), so cited by the Government, the court expressly stated that at the time the evidence in question was introduced, "there was already a prima facie showing of conspiracy."

The inconclusive nature of Heinz' statement, the fact that it referred to a period before Bowman was enjoined by the 1940 consent decree, and its incompetence as to Beloit are all factors which make it clear that Heinz' testimony could not change the substantial rights of the United States *vis-a-vis* Beloit.

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2. The Tape Recordings.

The witness Newey made no tape recordings of any conversations with any representative of Beloit (R. 423). Newey did state (R. 375) that Mr. Kost, representing Hawthorn, named Beloit when he named several dairies whose stops could not be taken. However, Newey admitted on cross-examination (R. 421) that "what recalls to your mind that Mr. Kost said that he couldn't take Beloit stops" was a reference in the verbatim transcript of the tape recording of Newey's conversation with Kost which said that Kost had gotten "a place up on Western Avenue right across from River Park, John's * * *," which was a former Beloit customer whose business Kost had been trying to get "for two or three years."

Thus, the only indication that Beloit was mentioned in any of the Newey tape recordings was a reference to strenuous efforts by a co-defendant to persuade a Beloit customer to begin taking milk from the co-defendant, which efforts were finally successful.

3. The Moser-Baril Conversation.

The offer of proof as to the conversations between Moser and Baril (R. 65) included no references whatsoever to Beloit.

CONCLUSION.

Nothing which the Government here contends the trial judge should have received in evidence would have sufficed to establish that Beloit was a party to a conspiracy to restrain commerce in fluid milk in violation of the Sherman Act. This being true, the judgment of the trial court dismissing this case as to Beloit should now be affirmed.

Respectfully submitted,

LEO F. TIERNEY,
CHARLES L. STEWART, JR.,
Attorneys for Appellee Beloit Dairy Company.

MAYER, MEYER, AUSTRIAN & PLATT,
Of Counsel.

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MOTION FILED APR 26 1954

IN THE

Supreme Court of the United States

OCTOBER TERM, 1953.

No. 464

UNITED STATES OF AMERICA,
Appellant,

vs.

THE BORDEN COMPANY, ET AL.,
Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS.

MOTION FOR LEAVE TO FILE A BRIEF ON BEHALF OF DEAN MILK COMPANY AS AMICUS CURIAE.

THOMAS C. MCCONNELL,
Attorney for Dean Milk Company.

THE BUNTHORP-WARREN PRINTING COMPANY, CHICAGO

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1953.

No. 464.

UNITED STATES OF AMERICA,

Appellant,

vs.

THE BORDEN COMPANY, ET AL.,

Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS.

MOTION FOR LEAVE TO FILE A BRIEF ON BEHALF OF DEAN MILK COMPANY AS AMICUS CURIAE.

Now comes Dean Milk Company, a corporation, by Thomas C. McConnell, its attorney, and asks leave of this Court to filed instanter a brief as *amicus curiae* in the instant case, and for cause shows:

This is a suit brought by the Government under Sections 1 and 2 of the Sherman Act (15 U. S. C. A. Sections 1 and 2) and under Section 2(a) of the Clayton Act as amended (15 U. S. C. A. Section 13(a)) to enjoin a conspiracy to monopolize trade and commerce in the sale of fluid milk to wholesale customers and certain public institutions in the

Chicago area, and to prevent discrimination in the price of sales of said fluid milk.

Movant, Dean Milk Company, obtained on December 3, 1952, the entry of a decree by the Honorable Michael L. Igoe, Judge of the District Court of the United States for the Northern District of Illinois, Eastern Division, enjoining among others the Bowman and Borden dairies from certain acts therein designated in the sale of fluid milk in the Chicago area. Said case is docketed as "*Dean Milk Company* v. *American Processing and Sales Company, Inc., a corporation, et al.,*" No. 49 C 1159.

In the decision of the instant case the trial court in referring to the above decree stated (111 F. Supp. 562, 581-2):

> "A decree of this court entered at the instance of a private litigant is as binding upon a defendant as a decree entered at the instance of the government; and a consent decree, entered by any judge of this court without hearing evidence, is as binding as a decree entered by another judge after a protracted trial. I conclude, therefore, that each of the remaining defendants is now effectively enjoined by this court from performing any of the acts set forth in the government's prayer for injunctive relief, insofar as the Clayton Act is concerned.
>
> "As a court of equity, I will not perform a useless task. The violations of the Clayton Act described in the complaint and shown at the trial are, for the most part, old violations. And to this court, the Dean decree assures, as completely as any decree can assure, that there will be no new violations.
>
> "For the foregoing reasons, the motions of defendants Bowman, Borden, Ridgeview, and Belmont to dismiss that part of the complaint which alleges violations of Section 2(a) of the Clayton Act must be granted."

It is submitted that the effect of these remarks by the trial court is to place upon a private litigant, Dean Milk

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Company, the burden of policing the entire milk industry in Chicago. Movant has neither expressly nor impliedly assumed such a burden, and for the reasons set forth in the accompanying brief does not wish to do so, and therefore asks leave to file herewith a brief as *amicus curiae* asking that the decision of the trial court in so far as it states "And to this court, the Dean decree assures, as completely as any decree can assure, that there will be no new violations" be reversed by the opinion of this Court.

Respectfully submitted,

DEAN MILK COMPANY, a corporation,

By THOMAS C. MCCONNELL,
Its attorney.

Dated: Chicago, Illinois,
April 23, 1954.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1953.

No. 464.

UNITED STATES OF AMERICA,

Appellant,

vs.

THE BORDEN COMPANY, ET AL.,

Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS.

MEMORANDUM OF DEAN MILK COMPANY AS AMICUS CURIAE.

This is a suit brought by the Government under Sections 1 and 2 of the Sherman Act (15 U. S. C. A. Sections 1 and 2) and under Section 2(a) of the Clayton Act as amended (15 U. S. C. A. Section 13(a)) to enjoin a conspiracy to monopolize trade and commerce in the sale of fluid milk to wholesale customers and certain public institutions in the Chicago area and to prevent discrimination in the price of sales of said fluid milk.

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In the decision of the instant case, the trial court stated (111 F. Supp. 562, 581-2):

> "Thus, the terms of Section VII of the Dean decree clearly enjoin Bowman, Borden, Ridgeview and Belmont from performing all acts which the government has specified in paragraph 10 of its prayer for relief.
> * * *
>
> "As a court of equity, I will not perform a useless task. The violations of the Clayton Act described in the complaint and shown at the trial are, for the most part, old violations. And to this court, the Dean decree assures, as completely as any decree can assure, that there will be no new violations.
>
> "For the foregoing reasons, the motions of defendants Bowman, Borden, Ridgeview, and Belmont to dismiss that part of the complaint which alleges violations of Section 2(a) of the Clayton Act must be granted."

We submit that the effect of these remarks by the trial court is to place upon a private litigant the burden of policing the entire milk industry in the City of Chicago.

The attorney for Dean Milk Company is also attorney for the plaintiffs in the case of *Bigelow, et al.* v. *RKO Radio Pictures, Inc., et al.,* a case which has previously been here for review. In that case, on an appeal to the Court of Appeals for the Seventh Circuit on one aspect of the injunction decree entered therein, the reviewing court took occasion to criticize the plaintiffs for undertaking to police the motion picture industry pursuant to the District Court's decree. The remarks of the Court of Appeals are contained in the volume of reports designated as 199 F. 2d 794, at page 797, and are as follows:

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"* * * It appears from the argument of counsel for appellees that while he insists that he represents only the owners of the Jackson Park Theatre, nevertheless he emphasizes the beneficent effects of the decree on other independents, stressing the improvement of the condition of competition in the Loop as well as in the outlying areas—thus indicating that he does conceive his position as one of policeman for the industry. * * *

"As we have previously indicated, it appears to us to be an unhealthy condition for one independent theatre to be, in effect, policing the industry for this entire area."

While we do not agree that the policing of the motion picture business is "unhealthy", we do wish to point out that we know from personal experience that it is beyond the financial means of any one litigant and beyond the physical strength and time resources of any one lawyer to police an industry *pro bono publico*. Obviously, it was never intended by the Congress that the efforts of a private litigant should entirely supersede the duties of the Department of Justice in policing an industry.

We submit that the position of the trial court is unfair to the private litigant and to the public interests so manifestly involved.

We submit that the decision on this issue is clearly in error and, because of the large questions of public policy and public interest involved, should be reversed by this Court.

If the present opinion is permitted to stand, then no Government injunction decree is possible where a private litigant has obtained an injunction concerning the same subject matter, and this on the trial court's theory that it would be performing "a useless task".

We submit that if the Congress had thought the task was useless it would not have granted rights to an injunc-

tion to both the Government and to the private litigant covering the same violations of law.

There is also danger in permitting the present opinion to stand in that it furnishes a basis for arguing the converse; namely, that no private decree of injunction should be entered where a Government decree has been obtained. This is a particularly dangerous doctrine in view of the penchant of anti-trust defendants to argue that a consent decree obtained from the Government disposes of all issues raised in private litigation concerning the same subject matter.

The effect of the present opinion obviously destroys rights and remedies granted the United States Government by the Congress and imposes upon a private litigant burdens in the public interest which the Congress itself never assumed to impose.

We therefore most respectfully submit that the decree entered by the District Court should be reversed.

Respectfully submitted,

THOMAS C. MCCONNELL,
Attorney for Dean Milk Company, a corporation.

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SUPREME COURT OF THE UNITED STATES

No. 464.—October Term, 1953.

United States of America, Appellant, *v.* The Borden Company, et al.	On Appeal From the United States District Court for the Northern District of Illinois.

[May 17, 1954.]

Mr. Justice Clark delivered the opinion of the Court.

The United States instituted this civil proceeding against ten Chicago dairies,[1] charging conspiracy to restrain and monopolize the sale of fluid milk to wholesale customers and others in the Chicago area, in violation of the Sherman Act, and price discrimination, in violation of the Clayton Act. Prior to trial a consent decree was entered against five of the smaller defendant companies, enjoining continuation of the conduct charged in the complaint. At the close of the Government's case against the remaining five defendants,[2] the District Court dismissed the complaint in its entirety. It held that, as to the alleged violations of §§ 1 and 2 of the Sherman Act, the evidence failed to establish the existence of a conspiracy or combination; and that, though there was proof of price discrimination violative of § 2 (a) of the Clayton Act by four of the defendants,[3] a prior decree in a private antitrust action brought by a competitor dairy company enjoined the conduct in question and made it "useless" to award the Government an injunction. The Govern-

[1] The Borden Company, Bowman Dairy Company, Belmont Dairy Company, Ridgeview Farms Dairy, Beloit Dairy Company, Capitol Dairy Company, American Processing and Sales Company, Hunding Dairy Company, Meadowmoor Dairies and Western United Dairy Company.

[2] Borden, Bowman, Belmont, Ridgeview and Beloit.

[3] Borden, Bowman, Belmont and Ridgeview.

ment then appealed directly to this Court under 15 U. S. C. § 29, and we noted probable jurisdiction, 346 U. S. 914.

Three of the four questions presented on this appeal deal with rulings by the district judge that certain evidence was inadmissible.[4] The Government does not challenge the court's conclusion that on the record conspiracy was not shown, but it insists that error in these rulings precluded establishment of the conspiracy. After hearing argument and considering as much of the record as is before us, including the Government's offers of proof, we are of the opinion that, even assuming error in each of the challenged rulings, it does not appear that admission of the evidence in question would have been sufficient to change the conclusion that the Government had not established a case under the Sherman Act; hence the rulings cannot be said to have affected substantial rights of the parties within the meaning of 28 U. S. C. § 2111.[5] Since on this basis we affirm the judgment of dismissal

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[4] The trial court refused to allow the Government to use for impeachment of a hostile witness a deposition taken in another case; to introduce in evidence certain tape recordings made for use in the prior case; and to introduce testimony as to a conversation with a deceased agent of one of the defendants.

[5] "On the hearing of any appeal or writ of certiorari in any case, the court shall give judgment after an examination of the record without regard to errors or defects which do not affect the substantial rights of the parties."

Fed. Rules Civ. Proc., 61: "Harmless Error. No error in either the admission or the exclusion of evidence and no error or defect in any ruling or order or in anything done or omitted by the court or by any of the parties is ground for granting a new trial or for setting aside a verdict or for vacating, modifying, or otherwise disturbing a judgment or order, unless refusal to take such action appears to the court inconsistent with substantial justice. The court at every stage of the proceeding must disregard any error or defect in the proceeding which does not affect the substantial rights of the parties."

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as to the Sherman Act allegations, it is unnecessary to discuss the propriety or impropriety of the several rulings.

The fourth question challenges the basis of the District Court's refusal to grant the Government injunctive relief against price discrimination by four of the defendants.[6] The district judge found that Government evidence tended to prove that these defendant companies have sold at prices which discriminate between purchasers of milk of like grade and quality. This, he said, would give defendants the burden of establishing that the discriminations fall within statutory exceptions, were it not that under a consent decree entered against defendants in a private suit in 1952 by another judge of the same court,[7] they already are enjoined from performing all acts specified by the Government in its prayer for relief. In the opinion of the district judge,

> "A decree of this court entered at the instance of a private litigant is as binding upon a defendant as a decree entered at the instance of the Government; and a consent decree, entered by any judge of this court without hearing evidence, is as binding as a decree entered by another judge after a protracted trial. I conclude, therefore, that each of the remaining defendants is now effectively enjoined by this court from performing any of the acts set forth in the Government's prayer for injunctive relief, insofar as the Clayton Act is concerned.
>
> "As a court of equity, I will not perform a useless task. The violations of the Clayton Act described in the complaint and shown at the trial are, for the

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[6] See note 3, *supra*. Since the Government does not question the correctness of the judgment of dismissal of its claim under § 2 (a) of the Clayton Act against Beloit, the fifth defendant, it is not before us.

[7] *Dean Milk Co.* v. *American Processing & Sales Co.*, U. S. D. C. N. D. Ill. E. D., No. 49 C 1159, Dec. 3, 1952.

> most part, old violations. And to this court, the Dean decree assures, as completely as any decree can assure, that there will be no new violations."

Accordingly the court dismissed that part of the complaint which alleged violations of § 2 (a) of the Clayton Act. Thus it appears that the Government was refused an injunction solely because of the existence of the prior decree entered against defendants in the course of a private action. We think that refusal on this basis constituted an abuse of discretion.

Section 15 of the Clayton Act, 15 U. S. C. § 25, charges the United States district attorneys, under supervision of the Attorney General, with the duty of instituting equity proceedings to prevent and restrain violation of certain of the antitrust laws, including price discrimination. Under § 16 of the Act, 15 U. S. C. § 26, a private plaintiff may obtain injunctive relief against such violations only on a showing of "threatened loss or damage"; and this must be of a sort personal to the plaintiff, *Beegle* v. *Thomson,* 138 F. 2d 875, 881 (1943). The private-injunction action, like the treble-damage action under § 4 of the Act, supplements Government enforcement of the antitrust laws; but it is the Attorney General and the United States district attorneys who are primarily charged by Congress with the duty of protecting the public interest under these laws. The Government seeks its injunctive remedies on behalf of the general public; the private plaintiff, though his remedy is made available pursuant to public policy as determined by Congress, may be expected to exercise it only when his personal interest will be served. These private and public actions were designed to be cumulative, not mutually exclusive. S. Rep. No. 698, 63d Cong., 2d Sess. 42; cf. *Federal Trade Comm'n* v. *Cement Institute,* 333 U. S. 683, 694–695 (1948). ". . . [T]he scheme of the statute is sharply

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to distinguish between Government suits, either criminal or civil, and private suits for injunctive relief or for treble damages. Different policy considerations govern each of these. They may proceed simultaneously or in disregard of each other." *United States* v. *Bendix Home Appliances*, 10 F. R. D. 73, 77 (S. D. N. Y. 1949). In short, the Government's right and duty to seek an injunction to protect the public interest exist without regard to any private suit or decree.

To hold that a private decree renders unnecessary an injunction to which the Government is otherwise entitled is to ignore the prime object of civil decrees secured by the Government—the continuing protection of the public, by means of contempt proceedings, against a recurrence of antitrust violations. Should a private decree be violated, the Government would have no right to bring contempt proceedings to enforce compliance; it might succeed in intervening in the private action but only at the court's discretion. The private plaintiff might find it to his advantage to refrain from seeking enforcement of a violated decree; for example, where the defendant's violation operated primarily against plaintiff's competitors. Or the plaintiff might agree to modification of the decree, again looking only to his own interest. In any of these events it is likely that the public interest would not be adequately protected by the mere existence of the private decree. It is also clear that Congress did not intend that the efforts of a private litigant should supersede the duties of the Department of Justice in policing an industry. Yet the effect of the decision below is to place on a private litigant the burden of policing a major part of the milk industry in Chicago, a task beyond its ability, even assuming it to be consistently so inclined.

We agree with appellees that the statute confers on the Government no absolute right to an injunction upon

a showing of past violation of the antitrust laws by defendants. As we said in *United States* v. *W. T. Grant Co.*, 345 U. S. 629, 633 (1953):

> ". . . the moving party must satisfy the court that relief is needed. The necessary determination is that there exists some cognizable danger of recurrent violation, something more than the mere possibility which serves to keep the case alive. The chancellor's decision is based on all the circumstances; his discretion is necessarily broad and a strong showing of abuse must be made to reverse it."

The Government contends that it has "an independent right to relief against violations of the Clayton Act, without regard to whether such violations previously have been enjoined by a decree in a private antitrust suit." But we cannot say that the existence of the private decree warrants *no* consideration by the chancellor in assessing the likelihood of recurring illegal activity. We hold only that, in view of the difference in the respective interests sought to be vindicated by the Government and the private litigant, the district judge abused his discretion in refusing the Government an injunction solely because of the existence of the private decree.

The judgment of dismissal as to the Sherman Act allegations is affirmed; as to the Clayton Act allegations the case is remanded to the District Court for further consideration, and such further proceedings as may be necessary, in accordance with this opinion.

MR. JUSTICE BLACK and MR. JUSTICE JACKSON took no part in the consideration or decision of this case.